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Roe and the Politics of Backlash: Countermobilization Against the Courts and Abortion Rights Claiming

Scott E Lemieux, *The College of Saint Rose*

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SCOTT E. LEMIEUX[1]

Introduction: Countermobilization and the Courts

Gay rights, the Court, and Countermobilization

In its *Lawrence v. Texas* decision[2] the Supreme Court of the United States struck down a Texas law that banned consensual sexual relations between, and only between, people of the same gender—a decision that was not particularly surprising to legal observers. More surprising, however, was its forceful overturning of *Bowers v. Hardwick*[3], a less than twenty-year-old precedent (and one which had been joined by two of the Court's current members.) While many speculated that the Court would strike the Texas law on relatively narrow grounds, Justice Kennedy's majority opinion directly repudiated its recent precedent: "The rationale of *Bowers* does not withstand careful analysis…*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled." The overturning of *Bowers,* a decision that upheld laws that mandated criminal sanctions for certain private sexual behaviors and had many ancillary consequences that deprived homosexuals of common rights in areas such as family law (among others),[4] would seem to be a major victory for gay rights litigators,[5] while the language of the Court's decision could be seen as provocative to critics of the decision.

A few months later, gay rights litigators won an arguably more momentous victory in *Goodridge* v. *Department of Public Health*.[6] In this case, the Massachusetts Supreme Court held that the state had to provide marriage benefits to same-sex couples. Although not a federal case, *Goodridge* (which cited *Lawrence*) seemed a harbinger of the sweeping social change many had predicted in light of the recent federal landmark. While the striking down of seldom-enforced sodomy laws had primarily symbolic and indirect impacts, sanctioning same-sex marriage would have potentially major implications.

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[1] Assistant Professor of Political Science, College of Saint Rose. Email:slemieux02@gmail.com.

[2] 399 U.S. 558 (2003).

[3] 478 U.S. 186 (1986).

[4] As Pinello notes, the success rate of gay rights litigation in various aspects of family law was significantly lower in the years immediately following Bowers. DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 16 (2003). While upholding rarely enforced sodomy laws had little direct effect, the case was often cited in decisions unfavorable to gay rights in fields such as adoption and other forms of family law.

[5] For an analysis of the litigation leading to Lawrence, see chapter 5 of ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS (2006).

[6] 798 N.E.2d 941 (Mass. 2003).

Many commentators, however, warned that both *Lawrence* and *Goodridge* would prove to be pyrrhic victories. Jeffrey Rosen argued that *Lawrence,* because of its excessively ambitious legal reasoning, would lead to a reigniting of the "culture wars." Indeed, according to Rosen, "The implications of Kennedy's far-ranging opinion have already begun to trigger a backlash."[7] Not surprisingly, given that gay marriage is a more hotly contested and salient issue than largely symbolic sodomy laws, *Goodridge* engendered more such predictions. Several journalists and scholars, pondering the aftermath of the case in *The New Republic*, argued that the decision was likely to have negative effects for those favoring marriage rights for homosexuals, even if they considered the policy outcome of *Goodridge* desirable. The journalist Jonathan Rauch—a supporter of full marriage rights for gays and lesbians[8]—argued that "judicial imposition could turn gay marriage into a poster child for judicial arrogance," and that "no marriage license will be issued to a same-sex couple in Massachusetts as a result of this decision."[9] Richard Posner argued that judicial intervention into the issue of gay marriage would appear "seriously undemocratic" and therefore would be perceived as illegitimate.[10] And Jeffrey Rosen, amplifying his earlier analysis of *Lawrence,* argued that the Massachusetts court had, like earlier state courts that ruled on same-sex marriage in Alaska and Hawaii, overplayed its hand and would ignite a serious public backlash:

> Last June, when the U.S. Supreme Court struck down sodomy laws in *Lawrence* v. *Texas*, critics objected that the unnecessarily broad opinion would reignite the culture wars by encouraging the lower courts to create a right to gay marriage before the public was ready to accept it. On November 18, in *Goodridge* v. *Department of Public Health*, the Massachusetts Supreme Judicial Court vindicated the critics' most extravagant fears, expansively citing *Lawrence* to justify its decision to redefine marriage to include same-sex unions. In addition to being constitutionally unconvincing, the decision was also politically naïve…[B]y presuming to redefine marriage, it threatens to provoke an unnecessary political backlash and to weaken the judiciary with another self-inflicted wound.[11]

Not enough time has passed to fully evaluate the predictions of a major backlash against *Goodridge* and *Lawrence*. However, the evidence for a powerful backlash created by these decisions as of 2007 has been less than overwhelming. The strongest piece of evidence is that during the 2004 election cycle—the first to follow the controversial decisions-- 13 states passed initiatives limiting marital (and, in some cases, civil) benefits to couples of the same sex. Although a data point in favor of the countermobilization hypothesis, it is less definitive than if first appears. First of all, we cannot know whether a grant of same-sex marriage by the Massachusetts legislature might have produced a similar

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[7] Jeffrey Rosen, "How to Reignite the Culture Wars," NEW YORK TIMES MAGAZINE, at 49, September 7 (2003).

[8] See JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (1st. ed. 2004).

[9] Quotes from an online symposium, available at http://www.tnr.com/doc.mhtml?i=debate&s=rauch111803. Web page last consulted July 6, 2007.

[10] Richard A. Posner, "Wedding Bell Blues," The New Republic (December 2003), 33-7.

[11] Rosen, supra note 7, at 19.

backlash; to isolate the effects of *litigation*, we have to turn to a comparative case. Even leaving this aside, the consequences of this backlash were less dire than it may appear at first glance. Most of the initiatives were largely superfluous, leaving gay people in the relevant states marginally or no worse off than they were before, as they "took no state-conferred rights, extant or imminent, away from gays and lesbian couples" in any of the thirteen states with the exception of civil benefits for state employees in Michigan.[12] The initiatives, therefore, were successful in states *already* hostile to gay rights and did little to alter the status quo. In fact, ten of the 11 states that ratified amendments on Election Day in 2004 had laws prohibiting same-sex marriage passed through their respective state legislatures before the election; nine of those ten states passed these laws years before *Goodridge* was ever filed. Because state constitutions are generally no harder to amend than ordinary statutes, the 2004 initiatives don't necessarily make future reforms notably more difficult; states prepared to pass legislation conferring gay rights are also likely to be able to have the votes to amend their constitutions to permit same-sex marriage rights as well. A federal constitutional amendment would have been catastrophic, but the proposed Family Marriage Amendment was a cynical non-starter that failed to garner even a simple majority in the Senate, let alone the two-thirds of the vote necessary to send the amendment to the states.[13] Not only was the backlash not clearly related to litigation per se, then, but its consequences were very limited in any case. (In Massachusetts, on the other hand, legislators who favored gay marriage fared *better* in the subsequent elections.)

Another potential element of the backlash is its effects on electoral politics. Many pundits cited conservative mobilization on gay marriage as a critical factor in George W. Bush's narrow re-election in 2004. However, several studies of voting behavior in the 2004 election have refuted this claim, finding that gay marriage was a low priority for most voters and that any increased turnout among southern evangelicals was cancelled out by secular Republicans who turned against Bush because of the gay marriage issue.[14] In addition, the Supreme Court of New Jersey's decision requiring that civil benefits be given to gay couples did not prevent the Democrats from taking both houses of Congress in 2006, making claims about the dire effect of successful gay rights litigation on Democratic electoral prospects even more difficult to sustain. At best, the issue of gay marriage would seem to have been a marginal factor in the 2004 elections.

Most striking, however, is what has happened in Massachusetts itself. In the state that one would expect to be the ground zero for an anti-gay and lesbian rights backlash, precisely the opposite has occurred. In 2007, an attempt to put a constitutional amendment to override *Goodridge* failed to secure even the necessary 25% of the vote in the legislature (let alone a majority), losing by

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[12] DANIEL PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 177 (2006).

[13] Id. at 178-79.

[14] See Hillygus, D.S. and Todd Shields, Moral Issues and Voter Decision-Making in the 2004 Election, 28 P.S. 201 (2005); Kenneth Sherrill, Same-sex Marriage, Civil Unions, and the 2004 Presidential Vote, in H.N. HIRSCH, ED., THE FUTURE OF GAY RIGHTS IN AMERICA (2005) For a general summary, see also PINELLO, AMERICA'S STRUGGLE, supra note 12, at 179-81.

a 151-45 vote.[15] Moreover, a poll taken just before the failure of the amendment showed that 56% of the population would have opposed the override even had the amendment made it to the ballot.[16] At best, then, evidence about a major backlash produced by gay rights litigation is mixed, and a case could be made that they are inconsistent with subsequent events.

Whether or not predictions about a backlash to *Lawrence* and *Goodridge* have been borne out, however, they are rooted in fairly common perceptions about judicial policy-making, and as such it is worth considering their theoretical foundations as well as their empirical validity. It is often argued as a general proposition that policy-making by courts is more divisive and less stable than that which is performed by more democratically accountable institutions. "While I have found no evidence that court decisions mobilize supporters of significant social reform," argues Gerald Rosenberg in *The Hollow Hope,* "the data suggest that they may mobilize opponents…one result of litigation to produce social reform is to strengthen opponents of such change."[17] Judicial review, it is argued in strong terms, may erode "the habits and temperaments of representative democracy," and the "growth of courtroom rights talk undermines perhaps the fundamental prerequisite of decent liberal democratic politics: the willingness to engage those with whom one disagrees in the ongoing attempt to combine diverse interests into temporarily viable governing majorities."[18] Under this logic, policy victories won in the courts are likely to be more divisive, likely to exacerbate conflict, and because of this, less stable. The price of victory in the courts, these scholars argue, is a heightened conflict that creates greater resistance to the newly-created policy. Particularly given the limitations on litigation as a policy tool[19], this is a drawback with potentially serious consequences.

On some level, this argument seems plausible. As E.E. Schattschneider famously noted, expanding the scope of a political conflict has unpredictable consequences—especially for groups seeking to enter public debate from a relatively disempowered position.[20] These counter-reactions are of particular importance to groups contemplating litigation as a strategy. Just as litigation (even if unsuccessful) might serve the purposes of an interest group by mobilizing activists and resources,[21]

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[15] Scott Lemieux, The Good News For Gay Rights, THE AMERICAN PROSPECT (June 19, 2007), available at http://www.prospect.org/cs/articles?article=the_good_news_for_gay_rights.

[16] Pam Belluck, Massachusetts Gay Marriage to Remain Legal, N.Y. TIMES, June 15, 2007, available at http://www.nytimes.com/2007/06/15/us/15gay.html?_r=1&n=Top%2FReference%2FTimes%20Topics%2FSubjects%2FM%2FMarriages&oref=slogin.

[17] GERALD N. ROSENBERG, THE HOLLOW HOPE 341-42 (1991).

[18] RAINER KNOPF AND F.L. MORTON, THE CHARTER AND THE COURT PARTY (2000), at 149.

[19] See, e.g., ROSENBERG, THE HOLLOW HOPE, supra note 17; DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); MICHAEL MCCANN, TAKING REFORM SERIOUSLY (1987).

[20] See E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE (1975), esp. ch.1

[21] See, for example, MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); Frances K. Zemans, Legal Mobilization: The neglected role of the law in the political system, 77

successful litigation might provoke a countermobilization of interests and resources that oppose the judicial action. In general, the effects of mobilization change the political context in ways that affect future mobilizations and political struggles. An adequate assessment of the political impact of *Roe* needs to take this broader political context into account, as Scheingold suggests.[22] Certainly, if one takes into account the ability of the Supreme Court to shape political discourse, there can be little question that its decisions may have effects that it did not intend and could not fully predict.

While it is not hard to find claims that cases such as *Lawrence* or *Roe v. Wade* are productive of particularly large countermobilization effects, these claims generally tend to be vague or undertheorized. Claims about countermobilization can mean a number of different things, carry different implications and rely upon a different set of empirical expectations. First of all, the countermobilization claim can potentially take a relatively *strong* and/or *weak* form. In the strongest version of this hypothesis, some scholars imply that a case such as *Roe* created more (or, at least, a qualitatively different form of) opposition than would have been produced by a similar policy outcome arrived at through legislative channels. A weaker version of the countermobilization hypothesis would merely insist that *Roe* generated opposition, but not necessarily more than a similar policy enacted by Congress (were such legislation constitutionally possible) would have. The first claim would be, if true, extremely important, while the latter claim would be trivial (at least as a claim about the *unique* impact of litigation.) Any change to the status quo has the potential to unleash contrary forces and unintended consequences; if changes achieved through litigation also have this potential, this would neither be surprising nor particularly interesting. Because assumptions and speculations about countermobilization have generally been embedded within studies that were focused on different questions, however, scholars have generally not made a careful distinction between these two very different claims.

The potential tendency of litigation to generate a relatively large amount of opposition, if true, has implications that go far beyond any one issue, or the policy impact of cases like *Roe v. Wade*[23] or *Lawrence v. Texas*. Logically, the forces that cause *Roe v. Wade* to generate more opposition should apply to other cases as well: As Scheingold argues in his compelling analysis of the political effects of litigation, "a more fundamental drawback is the tendency of litigative politics to shrink the field of political action and to cause divisiveness."[24] If litigation strongly contributes to what Kagan refers to as a culture of "adversarial legalism,"[25] this has the potential to be highly relevant not only for many issues within the United States, but for scholars of comparative law as well. Given the

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AM. POLITICAL SCIENCE REV. 690 (1983); Neal Milner, The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups, 8 LAW & POL'Y 105 (1986).

[22] Stuart A. Scheingold, Constitutional Rights and Social Change: Civil Rights in Perspective, in JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING (Michael W. McCann and Gerald L. Houseman eds., 1989).

[23] 410 U.S. 113 (1973)

[24] Scheingold, supra note 22 at 85.

[25] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

proliferation of judicial review (and, consequently, judicial policy-making) within liberal democratic polities,[26] the possibility that litigation will produce policy outcomes that are less stable, less amenable to resolution, and that tend to intensify social conflicts is a very important one, worthy of further study. It is important, therefore, to develop a theoretical framework that can be used to examine this question. Defining countermobilization as "mobilization against and stimulated by a successful change in the political status quo," I attempt to discern the unique judicial capacity (or lack of a unique judicial capacity) to generate countermobilization.

This paper will consist of two parts. First, I put forward a framework intending to clarify the debate about litigation and countermobilization. I begin by briefly discussing some cases, aside from *Roe*, that are often invoked as examples of the courts having the unique capacity to produce backlash. (The examples also further demonstrate that claims of countermobilization transcend political, ideological, and legal divisions.) I then attempt to use these various claims about countermobilization against the courts to create a framework that allows us to address the most interesting questions surrounding countermobilization against judicial policy-making, with a particular focus on putting such claims in comparative context. Are legal institutions different than other branches of government, or do they create similar amounts of opposition when resolving policy questions? To fill the theoretical void in the literature, I begin by examining the claims scholars have made about legal institutions, and the theoretical implications of these claims. There are two major types of particularities attributed to the policy-making of courts that are relevant to the countermobilization question: the nature of legal reasoning and legal ideology, and the nature of legal institutions and judicial power. Claims that the courts are more likely to generate countermobilization are most likely to be true if one or both of these general claims about legal discourses and legal institutions are true. I will also examine the claims of scholars who are skeptical about these alleged particularities of legal discourses and institutions.

In the second part of the paper, I apply this framework directly to the case of abortion litigation. In addition to the intrinsic interest and importance of this question, abortion is a useful case study to test the most interesting of the potential hypotheses about countermobilization—that judicial policy-making produces unique forms of countermobilization. With the possible exception of *Brown v. Board of Education*,[27] *Roe v. Wade* is the case most likely to be cited as having a particularly large countermobilization effect.[28] In order to examine claims about the purportedly unique

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[26] See, for example, C. NEAL TATE AND TORBJORN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER. (1997).

[27] 347 U.S. 483 (1954). The concept of anti-judicial "backlash" largely developed in response to Brown. See Robert Post & Reva Beth Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

[28] The advantage of studying abortion over civil rights is that, as an issue, it is much more amenable to comparative study, both within the U.S. and between the U.S. and other countries. Roe v. Wade followed more closely in the footsteps of the liberalization that occurred at the state level than the 1964 Civil Rights Act did after Brown. More importantly, virtually all liberal democracies underwent a liberalization of abortion laws in a roughly similar time frame, while it is difficult to find any case remotely comparable to American segregation of the 1950s in states with similar

elements of legal discourse and institutions discussed in this chapter, I compare the aftermath of *Roe v. Wade* to the countermobilization generated by the attempts at state-by-state abortion reform at the legislative level that immediately preceded it. I will then compare the American case to the Canadian case, in order to provide greater explanatory leverage. The combination permits the comparison between the countermobilization generated by courts in different countries that otherwise have broad institutional similarities, a comparison that is crucial to non-trivial claims about countermobilization generated by legal institutions.

This empirical study of reactions to abortion policy-making strongly suggests that conventional conceptions of legal institutions are in need of significant revision. A careful analysis of abortion policy-making in these case studies is not consistent with the claim that legal ideology and legal intuitions are unique in terms of the opposition they generate. My empirical analysis does not support the hypothesis that a successful nationwide liberalization of abortion law accomplished purely through state legislatures would have produced a lesser degree of countermobilization. Nor, on the other hand, do these case studies prove in general that the court's intervention had a significant "legitimating" effect, pre-empting political debate (although it would be easier to defend this position than the conventional countermobilization view.) Rather, I infer from the case studies an alternate theory that judicial policy-making should, in general, be expected to produce no more and no less countermobilization than commensurate policy-making by the political braches of the state. Because of this, I argue that just as the scope, degree, and forms of legal mobilization vary with many factors independent of judicial capacity and institutional structure, so does the scope, degree, and form of counter-mobilization vary with multiple social and institutional factors as well.

In short, judicial policy-making itself has little independent impact on counter-mobilization politics. Rather than starting with the assumption that legal discourse and legal institutions have inherently unique characteristics when they intervene in policy disputes, it seems more likely that court intervention into political disputes will generate support and face opposition of a quantity and quality comparable to other policy-making institutions. This empirical hypothesis, it should be noted, does not imply any position on the *normative* merits of the court's decision in *Roe v. Wade* (or any other case.) Whether the decision *should have* produced more opposition than a similar policy enacted through legislative means is—for the purposes of my argument here—beside the point. What matters is whether or not there is good reason to believe that it in fact did.

Countermobilization and Crying Wolf: Three Cases

Dred Scott, *Slavery and the Civil War*

Any bill of particulars alleging the Supreme Court's potential to create social discord is likely, if it does not begin with *Roe v. Wade,* to start with what Chief Justice Charles Evans Hughes called the Court's "self-inflicted wound,"[29] the 1857 case *Dred Scott v. Sandford*.[30] In retrospect, this decision wounded the Court foremost because of its grossly immoral and inegalitarian ideology (although this

governments at a similar time. While civil rights would be an excellent test of the hypothesis, therefore, getting leverage on the problem presents much greater difficulties than exist with the abortion case.

[29] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928(, at 50.

[30] 19 How. 393 (1856).

ideology was a much greater part of contemporaneous American political culture than many of the Court's latter-day critics imply). In addition—as Hughes's characterization leads us to believe—many have argued that the decision severely undermined the legitimacy of the Court as an institution. Some have gone so far as to charge the Court with initiating, or at least "inviting," the Civil War.[31] And many have argued that, at a minimum, the Court's intervention "exacerbated the tensions between the North and South and hastened the movement toward the Civil War."[32] In addition, the decision is often said to have significantly diminished the power and legitimacy of the Court. According to Segal and Spaeth, "[n]ot only did the decision precipitate the Civil War, the self-inflicted wound that the ruling produced all but destroyed the public's perception of the Court as objective, dispassionate, and impartial."[33] For this reason, claims that the Court has injured its own legitimacy by engaging in imprudent policy-making are very likely to invoke *Dred Scott*, particularly since the decision is widely and justly reviled across the ideological spectrum.

Chief Justice Taney's apparent belief that the Court was capable of resolving the issue of slavery was, to put it generously, proven wrong. To claim that the Court somehow caused the Civil War, however, is as implausible as Taney's misplaced hubris. Such assertions remove the Court from its historical context, conveniently omitting the fact that it was expressing the ideology of the Jacksonian faction that had been the largest force in American politics for decades.[34] It is not clear in which historical period the court was publicly perceived as impartial; certainly, it was not during the era of the Marshall Court.[35] While some have focused on the decision's internal weaknesses as an explanation for its failure to end the underlying conflicts it attempted to resolve, purely as a matter of legal craftsmanship Taney's opinion for the court was *not* particularly weak. As Mark Graber points out, while Taney's opinion undoubtedly contained contradictions and factual errors, the same was true of the dissenting opinions[36]—overall, *Dred Scott* represented a plausible

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[31] ROBERT BORK, THE TEMPTING OF AMERICA (1990) at 28.

[32] DAVID O'BRIEN, STORM CENTER 1996, p. 38)

[33] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 124 (2002).

[34] Indeed, as Fehrenbacher points out, the opinions expressed by Roger Taney about African-American citizenship in Dred Scott are essentially similar to those he expressed in an unpublished opinion as Andrew Jackson's Attorney General. DON E. FEHRENBACHER, THE DRED SCOTT CASE, ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 70, 348 (1978). See also AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE (2006), MARK GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

[35] See ROBERT G. MCCLOSKEY & SANFORD LEVINSON, THE AMERICAN SUPREME COURT Ch. 3 (2000).

3 (3d ed. 2000).

[36] Mark A. Graber, Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory, 14 CONSTITUTIONAL COMMENTARY (1997).

representation of Jacksonian constitutionalism, which was saturated with white supremacy and either the toleration of or outright support for slavery. Moreover, the most appalling normative judgment of the case from a contemporary perspective—the argument that neither slaves nor their descendants could be American citizens—was the *least* controversial conclusion of the opinion at the time, almost certainly commanding majority opinion even in the northern states.[37] And while this vision was in apparent contradiction with the stated principles of the Declaration of Independence, the same was true of the governing vision of a majority of American legislators and Presidents (not to mention, of course, the extensive legal framework that upheld slavery and the rights of slave owners even in Free states.) Overall, "a national poll would have shown that a majority of Americans approved of the *Dred Scott* decision and its racist version of American citizenship."[38]

Equally important here is what is reflected by the inability of either the majority or dissenting opinions in *Dred Scott* to produce internally consistent theories: the American Constitution itself was intentionally ambiguous about slavery, contrasting broadly egalitarian language with the explicit protection of slavery (and silence about who was granted American citizenship.) The dissension of the court was simply a replication of the struggles within American constitutionalism and party politics, as well as a reflection of the specific power struggles exemplified by the Jacksonians (although the 7-2 margin of the Court overstates the Jacksonians' support in 1857.) Contentions that the Court was responsible for the Civil War are defeated by an obvious counterfactual question: what would have happened had the Court *not* intervened? What if the Court had disposed of the case on narrow grounds, or decided the case in a manner consistent with Republican principles? In the latter case, the Civil War's arrival would have, if anything, been hastened; the Southern states would not have tolerated having the mechanisms and powers of slavery within the jurisdiction of Congress and the federal courts. Had the courts not intervened, the political branches would have been forced to resolve a conflict that had become irreconcilable. There was no compromise between the competing factions that was viable by 1857; either civil war or secession was all but inevitable, especially after Buchanan's disastrous attempt to recognize the fraudulent pro-slavery constitution in Kansas: "[t]he Democrats broke up over 'bleeding Kansas' and the Lecompton Constitution in 1857 and 1858," and "critics of *Dred Scott* never point to any alternative maneuver or compromise that would have successfully removed slavery from electoral politics in the 1850s."[39] To blame the Civil War on the Supreme Court is to mistake the symptom for the disease.

It is for this reason, of course, that most Democrats in Congress actively encouraged the intervention of the Court, and sought to define the issues surrounding slavery and the territories as judicial questions. The Court did not actively seize control of the major issues involved in *Dred* Scott; it was in a position to resolve them because the political branches could not reach a

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[37] As Rogers Smith notes, race was an absolutely crucial component of American citizenship laws in general; during the Jacksonian era—citizenship was defined in a way that very explicitly excluded non-whites. See ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY PAGE RANGE for Ch. 8 (1997). To blame the court exclusively for a position that was held by the dominant governing coalition of the time is ahistorical.

[38] SMITH, supra note 37, at 271.

[39] Mark A. Graber, The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary, 7 STUDIES IN AM. POLITICAL DEVELOPMENT 35, 50 (1993).

consensus, and preferred that the judiciary resolve the issue. "[T]he tendency to constitutionalize the territorial issue dated back many years. It was reinforced in 1856 by the peculiar needs of the Democratic party and especially by the strategy of unity by evasion, as embodied in the Benjamin formula, with a consequent increase in talk about 'leaving it to the Supreme Court.'"[40] There was a broad consensus—shared at the time not only by Stephen Douglas and James Buchanan, but by Abraham Lincoln—that the major issues surrounding slavery and territoriality were questions best resolved by the judiciary. The Taney Court in *Dred Scott* did not usurp Congressional power or supplant a national consensus; rather, "the Court was carrying out the wishes of Jacksonian moderates who desperately hoped that persons aggrieved by whatever decision the justices made might nevertheless be more disposed to accept constitutional principles announced by a 'neutral' judiciary than public policies than public policies enacted by elected officials."[41]

While *Dred Scott*, therefore, provides very convincing evidence that the Court does not automatically perform a legitimating function, it is much more problematic as an example of a unique countermobilization produced by the judiciary. It is true that the Court suffered a temporary decline in prestige, but it is hardly surprising that an institution dominated by Southern Democrats would lose power and prestige during the Civil War. The assumption that a Court dominated by southern and border state Democrats could have aggressively challenged the legislature or executive during the Civil War period had they merely avoided the sectional issues raised in *Dred Scott* is implausible in the extreme. Indeed, the logic of such an assumption collapses on itself—if the court destroyed its legitimacy by endorsing the Southern position a few months after an election *in which pro-slavery parties captured 67% of the popular vote,*[42] surely they would have not been able to preserve their authority while taking on a Republican President after Southern secession. The Court's institutional weakness following 1860 was inevitable, irrespective of how (or whether) they had ruled in *Dred Scott.* This fact is reinforced by the fact that the Court regained its institutional authority after the war ended. As McCloskey termed it, the Court's position after *Dred Scott* was "decline without fall."[43]

The Court's attempted intervention was ultimately unsuccessful, and the hopes of the elected officials who deferred the slavery issue to the Court were misplaced (although the Court helped the Democratic Party in the short-term.) *Dred Scott* failed to depoliticize the issues that led to civil war. But to pin the blame for the conflict itself on decisions of the Court is an implausible outgrowth of seeing the judiciary and political branches as engaged in zero-sum struggles. The theory that the court created the conditions that led to the Civil War is defensible only based on an underlying assumption that the Court upset an existing social consensus; such an assumption is, however, clearly false. The Court attempted to resolve an extremely divisive issue, at the legislature's invitation, after the legislature had failed to reach a consensus. The Court failed because the conflict was irreconcilable, not because of a special propensity of courts to create conflict. Attempts to pin the blame for the Civil War on the Supreme Court are shallow attempts to revise history; they ignore

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[40] FEHRENBACHER, supra note 34, at 208.

[41] GRABER supra note 39 48-9.

[42] James Buchanan, the Democratic President-Elect, received 45.6% of the vote, while Millard Fillmore's American Party received 21.1%. The Republicans captured only a third of the votes, although they did carry 11 states.

[43] MCCLOSKEY & LEVINSON, supra note 35, at 64-66.

the congruence of the Court's decision with the position of the contemporary governing coalition. And while there can be little question that the ideology represented by *Dred Scott* is a moral abomination, this cuts both ways for contentions that the courts are uniquely likely to generate countermobilization. If the Court recovered its institutional legitimacy so soon after *Dred Scott,* it is difficult to imagine a decision that would more permanently destroy the court's legitimacy.

Civil Rights and Reapportionment: Frankfurter and the "Political Thicket"

If the countermobilization thesis has a patron saint, it would be Felix Frankfurter. A fervent New Dealer and civil libertarian profoundly influenced by the New Deal constitutional crisis, Frankfurter was obsessive about preserving the political reputation of the Supreme Court by using its power sparingly.[44] This caution was famously evident in the Warren Court's major civil rights cases. Alexander Bickel, who clerked for Frankfurter, defended the "all deliberate speed" standard of implementation for *Brown II*,[45] a stance that was central to his theory of legitimate judicial review in his extremely influential book *The Least Dangerous Branch.* Frankfurter's apprehensive pragmatism is often credited with preserving the court during a potential crisis. Frankfurter worked hard to both delay the *Brown* decision and to make it as moderate as possible, often disagreeing with Justices William Douglas and Hugo Black in particular. "I will tell you," Frankfurter wrote the similarly inclined Justice Learned Hand two years after *Brown,* "that if the 'great libertarians' had had their way we would have been in the soup."[46] In the narrative of Frankfurter and his disciples, Justices Black and Douglas (as well as NAACP litigators) naively overestimated the court's authority, while Frankfurter believed that the Court had to tread carefully to preserve its authority to mandate desegregated schools. Frankfurter's conviction was that a carefully reasoned and non-accusatory set of opinions could persuade Southern moderates to comply with *Brown*. The belief that an appropriately worded opinion could persuade and educate moderate Southern elites compelled Frankfurter to write a concurring opinion in the landmark case *Cooper v. Aaron,* despite the fact that the Court had taken the additional and uncommon step of having every justice sign the opinion of the Court as a signal of its steadfastness in the face of Southern resistance.[47] (Frankfurter's insistence on concurring so infuriated Earl Warren that their relationship was permanently damaged, further suggesting both the degree of Frankfurter's commitment to persuading Southern elites, and how strongly he held to his immodest belief that he could successfully do so.)[48]

What is unusual about the praise for Frankfurter's political acuity is that his central premise—that the court, if sufficiently moderate, could persuade elite Southern opinion and inhibit serious resistance—turned out to be plainly wrong. As Tushnet notes, "Black and Douglas, who

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[44] See THOMAS KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY CH. 2 (2004).

[45] 349 U.S. 294 (1955).

[46] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 606 (2004).

[47] See LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS 161-62 (2000).

[48] See JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 232-34 (1989).

Frankfurter derided as the 'great libertarians,' understood the South better."[49] The notion of "all deliberate speed" as formulated in *Brown II* failed to temper southern perceptions of the Court. Despite the way the debate is often framed, Black and Douglas did not oppose gradualist formulations because they were unaware of Southern resistance—quite the opposite. Black, an Alabaman, was consistently candid with his brethren about the resistance that court-mandated desegregation would face, telling his colleagues that the Court "was going to be ignored" in the Deep South and raising the strong possibility of violent resistance.[50] The issue was how to respond to the inevitable resistance. Black and Douglas "believed, correctly, that all the court could accomplish in the short run was a clear statement of fundamental principle…only a few African-Americans were likely to be admitted to desegregated public schools in the deep South for many years; there was no reason to appease Southern sentiment through a gradualist decree; and much risk to the courts if they got into the business of government by injunction. They were right."[51] Given that only token integration would occur no matter what the Court did or what reasoning it used to defend the results, the only effect of Frankfurter's obfuscation was to give various tools of maintaining segregation legal cover by making these tools legally plausible responses to *Brown II*. The end result of the position urged by Frankfurter was "that the Court was willing to accept token desegregation—later."[52] Michael Klarman, although much more sympathetic than Tushnet to the Court's attempt to mollify the South through minimalist ambiguity, concedes that while "judges who profoundly disagreed with segregation might have followed unambiguous Court orders to impose it," *Brown II*'s "indeterminancy invited judges to delay and evade, which they were inclined to do anyway." Frankfurter's much-celebrated strategic machinations in the school segregation cases were ultimately useless at best and counterproductive at worst, and they hung judges that may have been willing to issue serious desegregation orders even in the face of very hostile public opinion out to dry.[53]

An even better example of Frankfurter's rather shaky grasp of the political context in which the Court operated, however, can be seen in the Warren Court's landmark reapportionment cases. Frankfurter's elucidation of the proper role of the Supreme Court in *Colegrove v. Green* [54] (which upheld the existing electoral boundaries of the grossly malapportioned Illinois legislature[55] by a bare 4-3 plurality) is a good example of Frankfurter's dire warnings about the consequences if the court overstepped appropriate bounds. "Courts," Frankfurter famously argued in *Colegrove*, "ought not to enter this political thicket…The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and,

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[49] MARK A. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 230 (1994).

[50] POWE, supra note 47, at 52. See also KLUGER, supra note 46, at 596.

[51] See TUSHNET, supra note 49, at 231.

[52] POWE, supra note 47, at 55.

[53] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 355-56 (2004).

[54] 328 U.S. 549 (1946).

[55] The population of electoral districts in Illinois at the time of the case ranged from 112,000 to 900,000.

ultimately, on the vigilance of the people in exercising their political rights."[56] In the context of this case, this is (to say the least) a curious argument—it is unclear what avenue disenfranchised citizens have to exercise "vigilance" in protecting their rights. When considered as part of Frankfurter's theory of judicial review, however, the decision's logic is comprehensible. To Frankfurter, the courts squandered their precious legitimacy when they entered into partisan conflicts, such as those involving apportionment. *Colegrove* is unintelligible if construed as a restrained deferral to the majority will—the result of the case was to leave the highly non-majoritarian Illinois legislature as it was—but it does make sense as an exercise about what Bickel would later call the "passive virtues."[57] By avoiding political conflicts and the hostility toward the court that they would generate, the Court could save its prestige for the few major cases—such as *Brown*—where its intervention was unavoidable. The use of various legal doctrines and formal rules, such as the "political questions" doctrine invoked in *Colegrove*, was a means of "protecting the judiciary from public backlash."[58]

Despite Frankfurter's bitter protestations, however, *Colegrove* would not survive his tenure on the Court. It was overturned in *Baker v. Carr*,[59] a case Earl Warren considered the most "vital" of his tenure.[60] *Baker* was quickly extended to mandate "one person, one vote" apportionment in all state legislatures, both lower and upper houses.[61] Frankfurter wrote a lengthy dissent that reiterated his long-standing belief that adjudicating the apportionment issue would be disastrous to the capacity and prestige of the Court. His dissent in *Baker* provides an eloquent summary of the thesis that judicial intervention can produce a severe countermobilization:

> Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our

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[56] KLARMAN, supra note 53, at 328.

[57] See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS PAGE RANGE FOR CH. 4 (1962). In invoking the "passive virtues," Bickel argued that the court should use judicially created technicalities, such as rules of standing, mootness and ripeness, and "political questions" doctrine, to avoid legal uncetainty that would pose political difficulties for the court if adjudicated correctly. As Gerald Gunther summarized it, Bickel's theory of judicial review entailed the court having "100% insistence on principle, 20% of the time." Gerald Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 3 (1964).

[58] POWE, supra note 47, at 201.

[59] 369 U.S. 186 (1962).

[60] Jack W. Petalson, Baker v. Carr, in THE OXFORD COMPANION TO THE SUPREME COURTOF THE UNITED STATES 59 (K. Hall, ed. 1992).

[61] The most important of these cases was Reynolds v. Sims, 377 U.S. 533 (1964), which clearly defined the "one person, one vote" rule and applied it to upper houses.

> constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

A similar argument was made by *Baker's* other dissenter, John Marshall Harlan, who argued that "[t]hose who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern."

Whatever the legal merits of the arguments advanced by Frankfurter and Harlan, their analysis could not have been a more wrongheaded empirical prediction of the public's reaction to the decisions. In their immediate wake, "[t]he Warren Court's reapportionment decisions in the 1960s were met with great public support and approval."[62] As Powe notes, the public's support was matched by editorialists who were often critical of the Court: "a survey of the sixty-three leading metropolitan newspapers showed that thirty-eight favored the decision and did so quite strongly, while only ten were opposed and only mildly so."[63] Public support was mirrored in state legislatures—despite the often fierce resistance they had shown after *Brown, Baker* and its progeny were quickly and uniformly implemented. Nor did this overwhelmingly positive contemporaneous reaction diminish in later historical evaluations of the Court. As Ely notes, within a decade *Baker* was generally regarded as one of the Warren Court's unassailable accomplishments, even by otherwise hostile observers.[64] Far from diminishing the Court's prestige, then, the reapportionment cases if anything strengthened it. The fears of Frankfurter and his admirers in the legal academy—though often cited to buttress predictions of countermobilization in other cases—were, at least in this case, completely erroneous.

Bush v. Gore *and the Disputed 2000 Election*

Another, more recent example of claims about countermobilization in reaction to Supreme Court decisions—one that is particularly instructive because the ideological shoe is on the other foot from *Baker v. Carr* and *Roe v. Wade*—is the Supreme Court's resolution of the 2000 Presidential

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[62] Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 YALE L. J. 153, 158 (2002).

[63] POWE, supra note 47, at 203.

[64] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 121 (1980).

election. In some ways, John Paul Stevens's eloquent dissent in *Bush v. Gore*[65] echoes Frankfurter in *Colegrove* and *Baker*:

> [Their] position is wholly without merit. The endorsement of that position by the majority of this court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is the confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[66]

Justice Breyer's dissent upped the ante by alluding to Chief Justice Hughes's famous characterization of *Dred Scott*: "we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation." Needless to say, the stinging critique of the dissenters has been echoed by a significant number of academic commentators, who have frequently emphasized the predictive aspect of Stevens's argument. "*Bush v. Gore*," writes one, "is likely to intensify public concern about unjustifiably aggressive decisions from the Supreme Court, and perhaps that concern will give the Court an incentive to be more cautious about insupportable intrusions into the democratic arena."[67] Another argues: "Many Americans who believed that the Court was an institution that could be trusted to remain above partisan politics are now experiencing a genuine loss of confidence in the impartiality in the judicial branch of our government."[68] The December 25, 2000, issue of *The New Republic* had on its cover a picture of the Supreme Court building with the large caption "DISGRACE" superimposed on the steps of the courthouse. The cover story about the decision was subtitled "The Supreme Court Commits Suicide." Invoking previous editors Alexander Bickel and Felix Frankfurter, Jeffrey Rosen argued that "the legitimacy of the judiciary is imperiled whenever judges plunge recklessly into the political thicket…But in *Bush v. Gore,* as in *Dred Scott* and *Roe v. Wade,* the justices perceived their job differently. They foolishly tried to save the country from what they perceived to be a crisis of legitimacy. And they sent themselves to hell in the process."[69] These reactions reflect the common assertion that *Bush v. Gore* would "reduce judicial legitimacy,

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[65] 531 U.S. 98 (2000).

[66] The comparison between Stevens and Frankfurter is not, of course, perfectly symmetrical. Stevens was not focused on the fact that the court had violated its institutional role, but rather upon the contempt displayed by the Court toward its counterparts in Florida. Stevens claims that the Court's authority would be undermined are more specific and less abstract than Frankfurter's.

[67] CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 222 (2001).

[68] Alan M. Dershowitz, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 6 (2001).

[69] Jeffrey Rosen, Disgrace, THE NEW REPUBLIC 18 (December 14 2000).

undermining the justices when they act within their proper sphere."[70] These predictions of a countermobilization against the Supreme Court in the wake of its intervention into the 2000 Presidential Election, like claims about the countermobilization to *Roe*, do not lack an intuitive plausibility. As with *Baker v. Carr, Bush v. Gore* was an extremely important decision, effectively handing a disputed presidential election that was for all intents and purposes a statistical tie to the candidate that received a lower percentage of the popular vote. *Bush v. Gore* (like, of course, *Roe v. Wade*) was an opinion that even many defenders of the outcome considered sloppy and unpersuasive legal reasoning, providing an opening for its critics. This is true to perhaps an even greater extent with *Bush v. Gore*. The central legal rationale of *Bush v. Gore* was "not only exceedingly ambitious but embarrassingly weak."[71] Some more favorable to the decision have described the interpretation of the equal protection clause that forms the core of the *per curiam*'s reasoning as "a confused nonstarter at best, which deserves much of the scorn that has been heaped upon it."[72] Moreover—and in this sense *Bush v. Gore* is different, in a way that would seem to reduce the Court's legitimacy even more, than *Roe v. Wade*—the *ad hoc* legal reasoning of *Bush v. Gore* was flagrantly inconsistent with the legal philosophy previously characteristic of the justices in the majority.[73] Whatever one thinks of the right to privacy that formed the core of the reasoning in *Roe v. Wade,* for example, it was an interpretive logic that the justices who formed the core of the majority (Douglas, Brennan, Blackmun, Stewart, and Marshall) had applied before; none of these justices, before granting certiorari, would have dismissed the idea that the Bill of Rights contained a right to privacy that could apply to reproductive decisions. Conversely, if prior to the outcome of the 2000 election one had asked William Rehnquist or Antonin Scalia if the equal protection clause required uniform vote-

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[70] Elizabeth Garrett, Leaving the Decision to Congress, in THE VOTE: BUSH, GORE AND THE SUPREME COURT 54 (Cass R. Sunstein, ed. 2001).

[71] SUNSTEIN, supra note 67, at 207.

[72] Richard Epstein, 'In Such Manner as the Legislature Thereof May Direct,' in THE VOTE: BUSH, GORE AND THE SUPREME COURT 14 (Cass R. Sunstein, ed.). See also RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CCONSTITUTION, AND THE COURTS (2001), Robert Bork, Sanctimony Serving Politics: The Florida Fiasco, THE NEW CRITERION (19:2001). The strategy of conservative defenders of the decision has tended to be to concede the weakness of the equal protection argument of the majority, and instead to latch on to the justification rooted in Article II, Section I offered by Justice Rehnquist's concurrence. To my mind, even leaving aside the fact that this opinion commanded the votes of only three justices, this reasoning is scarcely more persuasive. The fact that constitutional powers are delegated to the legislative branch does not, of course, preclude statutory construction by the judiciary; moreover, none of the defenders of the Rehnquist concurrence can explain why Article II Section I prevents judicial review by the state courts but can provide a basis for federal judicial review.

[73] For further elaboration, see HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION PAGE RANGE FOR CH. 6 (2001).

counting procedures or if the federal courts could substitute their construction of state election statutes with that of state courts, the answer quite clearly would have been "no." Finally, the outcome was not only unprincipled in comparison with the past jurisprudence of the justices but also unprincipled on its face. First, the majority opinion, attempting to limit the applicability of the newly minted equal protection rationale, argued that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." Secondly, while arguing that the recounts ordered by the Florida Court were constitutional, it took the highly unusual step of putting an end to recounts altogether rather than permitting the Florida Court to devise a standard that would make a recount consistent with constitutional requirements.[74]

Given that it was a decision that was highly consequential and used justificatory reasoning that was not merely weak but arguably written in bad faith, it does seem plausible that the decision might undermine the legitimacy of the Supreme Court and produce a strong reaction against the institution. However, while it is too early to be sure this hypothesis is difficult to support. There simply has not been a significant negative public reaction, and there is no evidence that the Court's overall legitimacy has been significantly undermined. Public opinion surveys taken after the decision have shown a consistent combination of public indifference and, when people have an opinion, support.[75] While, predictably, the court was viewed less favorably by Democrats after *Bush v. Gore*, it was viewed more favorably by Republicans, and the net effect was a wash.[76] President Bush, despite a razor-thin margin of victory, was successfully enacting an extremely ambitious political agenda and was reasonably popular even prior to the terrorist attacks of September 11. Nor have there been concerted attacks by Democratic legislators on the Court. The Court's institutional legitimacy was great enough in the aftermath of *Bush v. Gore* to strike down Michigan's undergraduate affirmative

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[74] The disjuncture between the constitutional violation and remedy is certainly the most indefensible part of the Court's opinion, and even the few legal scholars who have defended the equal protection rationale have generally argued against the rationale developed by the Court. See, e.g., Michael McConnell Two-and-a-Half Cheers for Bush v. Gore in THE VOTE (supra note 72) 117-8. Posner does defend the court's foreclosing of further recounts on pragmatic grounds (supra note 72 132-8).

[75] See James L. Gibson, et al., The Supreme Court and the U.S. Presidential Election of 2001: Wounds, Self inflicted or Otherwise? (2001) (unpublished manuscript). The issue of legitimacy is also addressed by Yoo. See John Yoo, In Defense of the Court's Legitimacy, in, THE VOTE (supra note 72). While Yoo's normative claim that the decision should not threaten the legitimacy of the Court is debatable, I have no doubt that his empirical argument about the decision's effects—essentially, that there is little reason to believe that Bush v. Gore will lead to a diminution in the Court's prestige, given the subsequent reaction—is correct.

[76] Sandy Levinson, The Law of Politics: Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons, 65 L. & CONTEMPORARY PROBLEMS 7, 24 (2002).

action admissions policy[77] and overturn *Bowers v. Hardwick*,[78] among other decisions regarding important, divisive social issues. In short, making a decision that would seem particularly ripe for countermobilization, the Supreme Court has encountered virtually none outside of the legal academy. While Posner may be correct that the ultimate evaluation of *Bush v. Gore* will depend on the success of the Bush Administration, and hence that a durable perception that his presidency was a failure could diminish the Court's public legitimacy to some degree, this would be a much more modest and contingent form of countermobilization than that foreseen by the decision's harshest critics.

Summary

These three brief case studies are intended to be suggestive rather than definitive. In *Baker v. Carr,* the evidence against the predictions of a backlash against the court is unambiguous. The *Dred Scott* case is more complex, and it is too early to be certain of the impact of *Bush v. Gore.* At the very least, however, these case studies suggest that claims about the court's unique propensity to created countermobilization are highly questionable. In addition, an examination of the arguments allows us to identify some of the reasons why the courts might be uniquely likely to produce countermobilization. The first set of explanations is that there is something about the nature of **legal institutions and/or legal discourse** that is less amenable to political compromise and particularly likely to inflame social conflict. This argument is particularly crucial to claims about the countermobilizing effects of *Dred Scott*: these arguments implicitly assume that legislatures are more institutionally suited to resolving difficult political problems. Related to this explanation, particularly important to *Baker v. Carr* is the **"countermajoritarian difficulty."** A specific institutional explanation, this explanation assumes that the legitimacy of courts is particularly fragile because they lack democratic credentials. A final explanation, particularly important to arguments about *Bush v. Gore* (but also a major part of analyses of the other two cases), holds that the ability of courts to make policy is dependent on the quality of the **legal reasoning** used to justify judicial intervention. Under this theory, the courts are not necessarily inherently weak policy-makers, but will lose their legitimacy if they cannot give persuasive legal justifications for what they are doing. As I will demonstrate next section, all of these arguments are used to explain the hypothesis that *Roe v. Wade* produced a uniquely strong backlash. Before I use abortion policy as a test case, however, I will conduct a detailed analysis of possible theoretical arguments supporting the proposition that the policy intervention of courts is particularly divisive, and also outline some potential objections to these theoretical arguments.

Legal Discourse, Legal Institutions, and Countermobilization

Developing a theory of countermobilization requires, first of all, an analysis of why we might think that the resolution of policy controversies by courts would produce more opposition. While these different conceptions are potentially complimentary and share some common assumptions, this is an important distinction—each potential basis for a uniquely "legalized" form of countermobilization has potentially different effects. Stressing the theoretical assumptions that

[77] Gratz v. Bollinger, 539 U.S. 244 (2003).

[78] Lawrence v. Texas, 539 U.S. 558 (2003).

underpin scholarly arguments is necessary to interrogate the larger significance of countermobilization. If the empirical basis for claims about the unique ability of decisions such as *Roe v. Wade* and *Bush v. Gore* to generate countermobilization is unsound, it suggests that we should reconsider some broader conceptualizations of legal ideology and legal institutions that we often take as axiomatic as well. The particular characteristics of legal institutions that act as policy-makers can also be thought as endemic to policy-making institutions in general. By focusing on these characteristics we may be both misapprehending the impact courts have on policy and obscuring or missing other aspects of legal institutions that are, in fact, different.

Legal Reasoning and Legal Ideology

Legal Ideology and "Rights Talk"

One potential source of countermobilization against courts is the potentially unique nature of legal discourse, which some scholars perceive as inherently different from ordinary political discourse (even when it is mobilized as part of a political conflict.) Perhaps the most common underlying theoretical assumption of scholars who propound the strong countermobilization approach is the influential literature about the nature of rights. According to one of its most influential adherents, Mary Ann Glendon, the particular form of rights associated with legal discourse is a socially destabilizing force. According to Glendon, this "legalistic" form of rights-claiming "disserves public deliberation not only through affirmatively promoting an image of the rights-bearer as a radically autonomous individual, but through its corresponding neglect of the social dimensions of human personhood."[79] In other words, the ultimate effect of rights discourse is to undermine social cohesion and exacerbate social conflict: they are "the language of no compromise."[80] If this assumption is correct, then it indeed stands to reason that the court's intervention into the abortion debate in *Roe v. Wade* would generate more opposition than a series of legislative acts at the state level that achieved the same result. And, indeed, Glendon has reached this conclusion directly. Her study of abortion policy in the United States and Europe argues that abortion litigation and the involvement of the judiciary in adjudicating the constitutionality of abortion law (uniquely present in the American case) has produced a political terrain characterized by strident conflict, implying that anti- abortion groups saw *Roe* as particularly illegitimate and mobilized strongly against it.[81] For Glendon, the presence or absence of rights is the crucial variable explaining the differences in European and American abortion politics. Similarly, Walter Berns argues that when in the American case abortion was established as a right: "…the Court *brought into being* an organized and frequently violent anti-abortion interest."[82] Berns's assessment implies two propositions, both important to the "rights-talk" perspective: first, that abortion was only broadly conceived of as a rights issue after the Supreme Court intervened, and second that there was little opposition to changes in abortion policy prior to *Roe*—implying that framing the issue within rights discourse turned abortion from an consensus-driven issue to a divisiveness-ridden issue. And while

[79] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109 (1991).

[80] Id. at 9.

[81] See generally MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

[82] WALTER A. BERNS, TAKING THE CONSTITUTION SERIOUSLY 228 (1987) (emphasis added).

some of the claims of rights-talk advocates are difficult to assess empirically, both of these claims are clearly falsifiable.

The "rights-talk" assumption, it is worth noting, has two implicit dimensions with respect to the question at hand. First, because of the destabilizing effects of rights discourse, we should presumably expect it to generate a greater *quantity* of opposition. In addition, this theory would expect a different *quality* of opposition—more hostile and less willing to accept adverse policy outcomes. As another scholar argues:

> Because rights seem to be especially powerful claims, discussions of rights tend to get particularly heated. Really fundamental matters seem to be at stake when rights are involved. Losing them seems to be tremendously damaging, something to be avoided at all cost. Compromises may seem unacceptable in principle because something fundamental is involved: How could pro-choice (or anti-choice) activists compromise to accept a legal regime in which women's access to abortion was impeded (restricting the fundamental right to choose) but not made impossible (contrary to the fetus's fundamental right to life)?[83]

This passage highlights a crucial implication of the assumption that legal ideology produces more countermobilization as it applies to abortion. The key empirical expectation, as applied to the abortion issue, seems to be that it is not abortion per se that tends not to be amenable to compromise solutions, or that there is something in general about the abortion issue in the United States that makes it particularly difficult to resolve, but the *use of litigation and/or rights discourse* within the abortion debate that makes compromise less likely.

Legitimacy and Legal Reasoning

In addition to an emphasis on the "divisive" nature of legal discourse, there is another way of arguing that legal discourse could conceivably contribute to social division. Under this theory, unlike the "rights-talk" theory, policy-making by the courts is not *necessarily* more divisive than policy-making by political branches—whether it is or not depends on how convincing the court is about its reasons for intervening in policy disputes. The quality of a legal opinion's justificatory legal reasoning, in other words, affects its public legitimacy: "As long as it wishes to be perceived as a court of law, the Supreme Court must demonstrate some commitment to stability, continuity, and logic in its rulings."[84] This argument can be seen in the critique of the United State Supreme Court's action made by Ruth Bader Ginsburg prior to her elevation to that institution: "*Roe,* I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but *majoritarian* institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[85] Ginsburg goes on to claim that had the court waited for the further development of

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[83] MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 140 (1999).

[84] ROBERT J. MCKEEVER, RAW JUDICIAL POWER?: THE SUPREME COURT AND AMERICAN SOCIETY 15 (1993).

[85] Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. REV. 375, 383 385-6 (1985). My emphasis.

gender-based equal protection doctrine and rested its abortion decision on that basis, the court's intervention would have been more widely accepted. The public did not accept *Roe,* Ginsburg argues, because it rested on legal reasoning that was both too innovative and insufficiently well-crafted. Had the Court avoided reaching a decision of *Roe*'s breadth until an equal protection argument that applied to gender was better-developed, the Court's intervention would have achieved a greater consensus.

Because the requirement to provide a written justification for its actions is among the most distinctive features of a "legal" (as opposed to "political") institution, this theory makes a certain intuitive sense, and explains to a good degree why legal scholars have invoked it in assessing controversial recent decisions such as *Bush v. Gore* and *Lawrence v. Texas.*[86] Similarly, *Roe v. Wade* is a decision whose legal craftsmanship is rarely praised even by scholars who are inclined to agree with its outcome—Mark Tushnet, who was a clerk of the Court at the time the case was decided and is certainly a supporter of *Roe's* result, is consistent with the general consensus when he argues that "…as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful…It is the totally unreasoned judicial opinion."[87] Because of this, *Roe* also represents a good case with which to test the hypothesis that unconvincing legal reasoning undermines the public legitimacy of the courts. If the court's legitimacy in resolving controversial disputes depends on the quality of the legal reasoning it uses to justify its decisions, it seems overwhelmingly likely that *Roe*—which, at the very least, is perceived by most legal elites to be unpersuasive legal reasoning even if its outcome was defensible—will severely undermine the public legitimacy of the Supreme Court.

The "Countermajoritarian Difficulty" and the Democratic Legitimacy of Judicial Policy-making

A second reason for believing that judicial policy-making will produce greater opposition is the unique institutional position of courts within the polity. While I separate the two concepts because one does not *logically* require the other, the idea that the ultimate democratic legitimacy of a case relies upon the quality of its legal justification relates to a broader theory about how legal institutions are perceived when they enter political conflicts. We would expect the legal resolution of a contested social issue, this line of reasoning goes, but such solutions are less stable because

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[86] Discussing the Lawrence case, one legal scholar argues that while the public might have accepted a narrow decision along the lines of Justice O'Connor's concurrence, the breadth of the opinion will cause the opinion to face widespread opposition. Jeffrey Rosen, Immodest Proposal, 25 THE NEW REPUBLIC 19 (2003).

[87] MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 53-54 (1988). Of course, as Tushnet uses this example to illustrate, the question of what constitutes adequate craft is an inherently contestable one, and particularly in the long run is inextricable from the perceived legitimacy of the opinion's result. A more generous reader, Tushnet argues, could conceivably defend Blackmun's unusual majority opinion in Roe as an "innovation" comparable to the innovations in novelistic form that manifested in Joyce's Finnegans Wake and Mailer's The Executioner's Song. Id. at 54. For my purposes here, what matters is how the craft of an opinion in perceived at the time by legal scholars,

unaccountable and countermajoritarian courts have less inherent democratic legitimacy than do legislatures. Because of this, we would expect the legitimacy of courts to be particularly weak when striking down the acts of democratic legislatures (as in *Roe*). This is the theory that Lovell calls the "legislative baseline," whose "core assumption is that outcomes established by elected legislatures form a democratic baseline against which to evaluate decisions made by less directly accountable judges."[88] Alexander Bickel conceptualzed the potential illegitimacy of judicial actions that strike previously passed statutes of the legislature: "…when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[89] The "countermajoritarian difficulty" identified by Bickel certainly provides a plausible explanation for why litigation may produce more opposition than legislation—the policy outcomes produced by courts have less democratic legitimacy, thus are less likely to be accepted by opponents and/or to mobilize new opposition.

An adjunct of the "legislative baseline" is the argument made by Justice Scalia about federalism in his dissent in *Planned Parenthood v. Casey*. Repeating the insight of James Madison in *Federalist 10* to make the opposite normative point,[90] Scalia argues that the issue of abortion is more fruitfully "resolved" by state legislatures, which are likely to represent more homogenous populations—therefore making more likely the formation of large, stable majorities that favor a particular abortion policy. In addition, Scalia's argument implies that state level majorities will see preemptions of their legislative authority as *particularly* illegitimate, more so than a judicial act that nullifies an act of Congress or the federal executive, which represents a more diffuse and fractured governing majority. Again, if one accepts the crucial assumptions of the legislative baseline approach—that legislative institutions effectively represent majorities and that electoral accountability is the key component of democratic legitimacy—then this hypothesis is a logical one.[91] While there are evident methodological difficulties with the comparison of abortion politics before and after *Roe v. Wade*, one benefit of the empirical comparison is that it allows us to analyze this particular dimension of the putative "countermajoritarian difficulty."

It should be noted that the scholars who emphasize the importance of the "countermajoritarian difficulty" do not necessarily perceive all countermajoritarian interventions by the courts as being illegitimate. In this sense, Bickel's conception of the democratic legitimacy of courts has obvious consonances with scholars who emphasize the centrality of legal reasoning, although they attempt to situate the importance of legal reasoning within a broader institutional

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[88] GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 4 (2003).

[89] See BICKEL, THE LEAST DANGEROUS BRANCH, supra note 57 at 16-17.

[90] See especially DAVID WOOTON ed., THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 167-74 (2003).

[91] For further elaboration of this point, see Lovell, supra note 89, at ch. 1.

context. Bickel and his adherents, for the most part, do not argue against judicial review *tout court*.[92] Rather, they attempt to identify contexts in which judicial review is legitimate. Judicial legitimacy must depend on a persuasive opinion that can convince the public that the court's intervention was principled. Indeed, in Bickel's wake, identifying the circumstances under which policy-making by the courts is legitimate was perhaps the central question among normative constitutional scholars. The legitimacy of judicial review to many mainstream legal scholars, therefore, ultimately comes down to the persuasiveness of the legal reasoning used to justify the nullification of the action of another branch.[93] The emphasis of the "undemocratic" nature of courts and the centrality of legal reasoning are concepts that are worth keeping theoretically distinct, as previously noted; the first assertion does not require the second. Some, more critical, legal scholars generally share Bickel's presumption that the courts are undemocratic and therefore illegitimate policy-makers, but are highly skeptical that any method of legal reasoning can effectively justify policy intervention by the courts.[94]

Skeptics of Judicial Exceptionalism

Not all scholars, of course, argue that judicial institutions have inherently unique effects when they resolve policy disputes. To skeptics of what might be called "judicial exceptionalism," the public is likely to evaluate policy outcomes based on their consistency with their own policy preferences, irrespective of the type and nature of the institution making policy. This way of looking at courts would also emphasize that the public knows and cares very little about the legal reasoning used to justify exercises of judicial review. In addition, there are good reasons to be skeptical about claims that "rights-talk" is either *particularly* "divisive" or limited to the courts. If this perception of the courts is accurate, it might be generally expected that the courts would produce no less and no more social resistance than would commensurate policy-making by other branches. This more

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[92] See, e.g., CHRISTOPHER F. ZURN, DELBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW 32-36 (2007).

[93] Of course, the type of legal reasoning that constitutes a legitimate basis for judicial activism (in the non- pejorative sense of the judicial nullification of legislative or executive acts) differs among scholars who generally share many of Bickel's assumptions about democratic legitimacy and judicial review. Compare e.g., BICKEL, supra note 57, with ELY, supra note 64, and KEITH E. WHITTINGTON, CONSTITUTIONAL INTRERPRETATION(2000).

[94] See, e.g., Duncan Kennedy Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976), TUSHNET, supra note 88, GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993). As I will argue in the next section, however, while critical scholars generally feel that legal reasoning will not be able to normatively justify judicial usurpation of democratic prerogatives, legal reasoning may have the effect in practice of legitimating policy interventions that would otherwise be immediately seen by the public as illegitimate.

skeptical attitude toward perceived differences between legislative and judicial policy-making has been elaborated by a number of excellent general studies[95] and can also be seen, for example, in empirical studies of the extensive reform of state prisons led by the judiciary,[96] and of institutional relations between courts and legislatures in federal labor legislation.[97] As applied to *Roe,* this way of looking at courts would tend to imply that a similar policy outcome produced by Congress would have generated comparable levels of countermobilization to those produced by *Roe.* Again, the implication is not that *Roe* did not generate resistance, but only that the resistance it generated was not a result of some particular characteristic of judicial institutions. According to this logic, abortion is not a "divisive" issue in the United States because of the intervention of the courts, but is an issue not easily amendable to compromise, irrespective of the particular institutional venues in which policy struggles occur.

It is worth emphasizing again that this claim about the effect of courts is quite distinct from any claims about the *normative* legitimacy of judicial review. A similar argument made in the immediate wake of the decision by John Hart Ely, a famous critic of *Roe v. Wade*, can serve to clarify the nature and limitations of my argument here:

> …it is difficult to see how [*Roe*] will weaken the Court's position. Fears of official disobedience are obviously groundless when it is a criminal statute that has been invalidated. To the public the *Roe* decision must look very much like the New York legislature's recent liberalization of its abortion law. Even in the unlikely event someone should catch the public's ear long enough to charge that the wrong institution did the repealing, the public has heard this "legalism" before without taking to the streets. Nor are the political branches, and this of course is what really counts, likely to take up the cry very strenuously; the sighs of relief as this particular albatross was cut from the legislative and executive necks seemed to me audible…
>
> It is, nevertheless, a very bad decision. Not because it will perceptibly weaken the court—it won't; and not because it conflicts with either my idea of progress or what evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.[98]

As Ely's argument suggests, the empirical claims of the "weak countermobilization" argument are separate from and do not require any normative claims about a particular judicial action. When I invoke "legitimacy" in the context of this paper, I mean it in the sense of Max Weber's definition of

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[95] See, e.g., MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT; NEW APPROACHES TO POLITICAL JURISPRUDENCE (1964); TERRI JENNINGS PARETTI, IN DEFENSE OF A POLITICAL COURT (1999).

[96] MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

[97] See LOVELL, supra note 89.

[98] JOHN HART ELY, ON CONSTITUTIONAL GROUND 296 (1996).

legitimate legal authority—that is, in a fundamentally empirical and not normative sense.[99] Institutions are legitimate when their authority is respected.

Implicit in this distinction is a strong measure of skepticism about the tendencies of some legal scholars to project their concern with the craftsmanship of judicial decisions onto the public as a whole. While some claims about the unique problems of judicial legitimacy rest on the quality of judicial reasoning, this attribution of priorities does not, to put it mildly, rest on very persuasive empirical grounds. As Tushnet argues, "It is implausible…that [the] neutral application of principles is an important source of public acceptance of judicial decisions. The general public is unlikely to care very much with a court's reasoning process…its concern is with results."[100] What matters for the purposes of my argument here is whether the court is, in practice, considered a more or less legitimate policy-maker when compared to the political branches. It is, of course, possible (like Ely) to believe that the public's reaction even to cases that one believes are normatively indefensible will be based on its policy preferences. Conversely, it is also possible to believe (as many do, especially in the context of *Roe*) that judicial decisions that are normatively desirable will provoke more resistance than similar policies would have were they legislatively enacted. The fact that many scholars conflate the arguments that Ely is careful to keep distinct, however, should warn us about the potential dangers of the unsubstantiated attribution of preferences. It is tempting to assume that the public will share one's normative views about the actions of courts, but in order to obtain a clear empirical picture this temptation must be resisted.

While I will further explain this theory within the following sections, a few of its key premises can be usefully identified. The first is that the public "evaluates [judicial decisions]…in largely political terms."[101] In other words, most non-specialists will react to the policy-making of the courts in the same way they react to the policy-making of other branches. Secondly, on a related point, the public perception of a judicial opinion is not substantially affected by the quality of legal craftsmanship underlying the jufiscatory reasoning. The public is unlikely to support a legal ruling that goes against strongly held political preferences even if the decision is persuasively and coherently reasoned. The public is also unlikely to reject a ruling that supports strongly held political preferences no matter how specious or willful the underlying jufiscatory legal reasoning is. (Or, to come from the opposite direction, people are unlikely to perceive sound reasoning in a decision with which they disagree.) One good example of this, as Phillip Bobbitt points out, is *U.S. v. Nixon,*[102] which forced President Richard Nixon to hand over potentially incriminating White House tapes. As Bobbitt notes, due to internal disputes on the Court[103] the opinion represents "the worst set of doctrinal arguments—the least convincing, the most easily disputed, brief but repetitious, bombastic

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[99] See MAX WEBER ET AL., ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 215-16 (1978). For a comparable argument about the law and legitimacy in practice, see also Alan Hyde, The Concept of Legitimating in the Sociology of Law, WISC. L. REV. 379 (1983).

[100] TUSHNET, supra note 88 at 47 n.79.

[101] PARETTI, supra note 96, at 188.

[102] 418 U.S. 683 (1974).

[103] See SCOTT ARMSTRONG AND BOB WOODWARD, THE BRETHREN: INSIDE THE SUPREME COURT 301-49 (1979).

but unmoving—one is likely to encounter in the recent volumes of the United States Reports."[104] And yet, the opinion was generally well-received by both legal commentators and political actors, because of the strong consensus that the outcome was correct. Third, differences between the courts and the political branches in terms of their public responsiveness are generally overstated. The "countermajoritarian difficulty" (at least in the context of American political institutions) establishes a transparently false dichotomy, as it overstates the extent to which legislatures represent majoritarian values and understates the extent to which courts reflect them.[105] Fourth, rights discourse is not necessarily more "divisive" than the other forms of political discourse. And lastly, even if rights discourse *is* more "divisive," because legal institutions use many other discourses besides rights discourse, and noting that rights discourse is often used by political actors outside the courts, this distinction is of little value in determining whether courts tend to generate more countermobilization than political branches.

The empirical evidence in the subsequent section provides compelling evidence for each of these claims. In the American case, abortion politics at the state level involved much of the same uncompromising discourse and gritty interest-group conflict that has characterized the abortion debate in the post-*Roe* era, and the movement to liberalize abortion laws at the state level had largely stalled due to very effective countermobilization by anti-abortion groups.

Courts as a Legitimating Institution

There is a very different way in which the courts might be considered unique and that challenges the assertion that the legitimacy of courts is particularly fragile. Because few people believe this approach is applicable to abortion politics (at least in the American case), I will address it in less detail. It is worthy of identification, however, because it may apply in other cases, and in addition it helps to conceptually clarify the opposing arguments. This way of looking at courts suggests that courts have *more* social authority, and are more likely to resolve social conflicts in a stable manner, than the political branches. This underlying theory is, for very different reasons, a relatively conventional view of the law[106] and is useful to many of the most radical legal scholars.[107]

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[104] PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 212 (1982).

[105] See Terri Paretti, An Empirical Analysis of Alexander Bickel's THE LEAST DANGEROUS BRANCH, in THE JUDICIARY AND AMERICAN DEMOCRACY (Kenneth D. Ward and Cecilia Rodriguez Castillo eds. 2005). As Barry Friedman points out, an irony of the "countermajoritarian difficulty" framework is that the scholars who developed it were tortured about decisions, such as Browm v. Board, Baker v. Carr, and Griswold v. Connecticuit, that represented the values of at least the national governing majority, but were generally much less concerned about the Warren Court's genuinely countermajoritarian decisions, such as Engel v. Vitale and Miranda v. Arizona. Friedman, supra note 62, at 158.

[106] See, e.g., Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. OF PUB. L. 279 (1957).

The traditional view of the law holds that the role of the courts is to provide authoritative resolutions to social conflicts and uphold social order, and their perceived impartiality gives them the reservoir of legitimacy that enables them to do so. For more critical legal scholars, this legitimation has a normatively sinister aspect—legal institutions act to legitimize and rationalize an inequitable social order that would not be accepted if it were unmasked. Whether or not this role of the courts is normatively desirable or justifiable, both schools would suggest that, at least on balance, the policy-making of courts may be more stable and socially accepted than policy-making by political actors.

Of course, because of the ongoing controversy surrounding abortion in the decades following *Roe v. Wade* very few people would argue that this theory best accounts for abortion politics in the United States. To provide one illustrative example, starting in 1974, there were massive "March to Life" rallies held in Washington D.C.; between 1975 and 1980 these marches attracted no fewer than 25,000 people, capping a head count of 70,000 in 1978.[108] As Rosenberg notes, "The years after Court action have also seen the growth of an anti-abortion movement…they have marched, lobbied, and protested, urging that abortion be made illegal in most or all circumstances."[109] A strong movement emerged that saw *Roe* as at least retrospectively significant.[110] There can be little question that such opposition exists; the question is whether there would have been similar opposition had liberalization occurred *without* the Court. This traditional view of law may to some extent explain, however, the prevalence of the hypothesis that the courts are more likely to generate resistance. Certainly, Justice Scalia is correct that—despite the implication of the plurality opinion in *Planned Parenthood v. Casey*—the United States Supreme Court has not politically "resolved' the abortion debate. It is important, however, to distinguish this argument from the argument that the courts generated greater resistance *than a similar legislative resolution would have.* The claim that the intervention of the courts has not significantly reduced the socially divisive nature of abortion in the American context—which is, I agree, a virtually unassailable argument—by no means requires the conclusion that the courts have made the issue *more* divisive. Proving the second claim requires a distinctly different form of evidence. In addition, when thinking more generally about the political impact of the courts we should be open to the possibility that there are issues in which the ability of the courts to "legitimate" resolutions to political conflicts does provide the superior explanation. One can plausibly argue, for example, that the court's decision in *Bush v. Gore* was more widely accepted than the same resolution reached by Congress and/or the Florida

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[107] For important examples of Critical Legal Studies and Critical Race Studies scholarship, see, for example, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); Mark V. Tushnet, An Essay on Rights, 62 TEX. L. REV. 8 (1984); Mark V. Tushnet, Critical Legal Studies: A Political History, 100 YALE L. J., 1515 (1991); SPANN, supra note 95; and DAVID E. KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (3d ed. 1998). For a critical analysis, see Rogers M. Smith, After Criticism: An Analysis of the Critical Legal Studies Movement, in JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING (Gerald Houseman ed. 1989).

[108] BARBARA HINKSON CRAIG AND DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 51 (1993).

[109] ROSENBERG, THE HOLLOW HOPE, supra note 17, at 188.

[110] KRISTEN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD ch. 6 (1984).

legislatures would have been. In addition, it is important to consider the possibility that the legitimation theory may be applicable to abortion in other countries. With respect to the abortion issue, however, the relevant question is not whether the judiciary faced significant opposition but how this opposition would have compared to a similar legislative intervention. Claims that the courts created a stronger countermobilization are most likely to be true if the courts really are different than political institutions, either because of the judiciary's need to explicitly justify its actions or because it has different institutional sources of legitimacy.

Conclusion

The strong version of the claim that courts can create countermobilization is, if true, of major importance to scholars of American and comparative law, and not simply to people with an interest in the politics of abortion. If any of the generalized claims underlying the strong countermobilization assumption are true, then it is likely that the international proliferation of judicial review will fundamentally change the political culture of nations, and do so in a way that many would consider undesirable. If true, this finding would be particularly important to democratizing states—if judicial review undermines social stability and exacerbates conflict, judicial review may be a particularly poor fit for such countries. However, cases such as *Baker v. Carr* and *Bush v. Gore* also suggest that these assertions about the effects of judicial policy-making cannot simply be taken for granted. *Baker v. Carr* fails to meet the requirements of the weaker version of the countermobilization hypothesis, while *Dred Scott* and *Bush v. Gore* cannot plausibly be used to defend the strong countermobilization hypothesis. The anticipated backlash against *Lawrence* and *Goodridge* has been underwhelming. While it is too early to be sure, claims about a backlash created by judicial policy-making with respect to gay rights are scarcely more plausible than similar claims about *Baker v. Carr* and *Bush v. Gore*. The fact that these cases do not fit, however, is far from definitive. The case of abortion provides fertile ground for an in-depth case study for two reasons. First, because it is so often cited as an example by proponents of the argument that judicial intervention is particularly likely to produce a public backlash, it provides a "tough case" for my alternate hypothesis. Second, the case of abortion provides a chance to test all elements of a potential strong claim for legal mobilization. Because abortion is strongly linked with rights discourse, has been subject to both legislative and judicial policy resolutions, and because the judicial intervention in the United States is generally seen as being justified with a weak judicial opinion, the history of the Supreme Court's interventions into abortion policy allows us to examine the different theoretical underpinnings for broader arguments about countermobilization. The next section of the paper will use the issue of abortion to examine these different theories about countermobilization.

Abortion and Countermobilization

Countermobilization and the Myth of *Roe*

> "The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level, where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion

> marches on Congress before *Roe v. Wade* was decided…*Roe's* mandate for abortion on demand destroyed the compromises of the past, and rendered compromise impossible for the future."
>
> —Justice Antonin Scalia, dissenting in *Planned Parenthood v. Casey*[111]

The above passage expresses the essential logic of the strong countermobilization hypothesis. It is, perhaps, not surprising that Justice Scalia—a long-standing opponent of *Roe v. Wade*—would claim that it has undermined the legitimacy of the court and made the abortion issue more divisive in general.[112] His claim that *Roe v. Wade* was a particularly divisive event that produced unusually vociferous opposition is by no means, however, limited to its conservative critics (on and off the bench.) Some liberals have also raised questions about the unintended consequences of their putative victory. While Justice Ruth Bader Ginsburg is frequently not allied with Justice Scalia on the Court,[113] and although she is generally a supporter of abortion rights, she has nonetheless expressed similar doubts about the ultimate efficacy of *Roe v. Wade*. At a speech given at UNC Law School before she was appointed to the Supreme Court, Justice Ginsburg offered the following analysis, contrasting the Court's landmark abortion decision with its rulings on gender and equal protection.

> The Court's gender classification decisions overturning state and federal legislation, in the main, have not provoked large controversy; the Court's initial 1973 abortion decision, *Roe v. Wade,* on the other hand, became and remains a storm center. *Roe v. Wade* sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action. In my judgment, *Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures…in my judgment, *Roe* ventured too far in the change it

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[111] 505 U.S. 833, 995-6 (1992).

[112] The theory that decisions such as Roe have undermined both the legitimacy of the courts and social cohesion more generally is not, of course, uncommon among conservative intellectuals. For example, a comparison between Roe v. Wade and Dred Scott v. Sandford was made several times during a symposium on the Supreme Court in the conservative Catholic journal First Things. According to the political scientist Robert P. George, the lesson of both Roe and Dred Scott was that "courts exercising the power to invalidate legislation as unconstitutional can themselves trample upon fundamental human rights." Muncy and Neihaus The End of Demoracy (1997), 55.

[113] Justice Ginsburg is, in fact, less likely to vote with Justice Scalia than with any other justice with the exception of Justice Thomas. See JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 400 (2002).

> ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures.[114]

The Court, Ginsburg argues, overreached in its *Roe* decision, and therefore generated far more opposition than would have occurred had the legislative process allowed to play itself out at the state level.

As Justice Ginsburg's remarks suggest, the perception that *Roe* ignited an unusually intense opposition is not merely a rhetorical tool wielded by opponents of the decision; the claim that *Roe* "is generally credited with having launched the modern U.S. Right to Life movement[115]" is quite widespread. A number of scholars interested in the political impact of litigation have also emphasized the extent to which *Roe v. Wade* has mobilized conservative and anti-abortion activists. Canon and Johnson, in their review of the impact of judicial decisions on abortion, argue that "groups opposed to the decision grew rapidly in number…opposition groups, more so than supporters, included many people who had the time to picket, orchestrate letter-writing campaigns, call legislators, and participate in other political activities."[116] Faye Ginsburg, in her trenchant study of pro- and anti- abortion activism, argues that *Roe* was "a catalyst to subsequent developments that Americans have come to identify as the current controversy, particularly the rise of the right-to-life movement."[117] Tarrow's seminal study of social movement politics identifies the rise of organized anti-abortion politics specifically with *Roe*: "The access to abortion rights that was decreed by the Supreme Court in the early 1970s galvanized Catholics and fundamentalist Protestants to organize against abortion clinics."[118] Finally, in his influential study of the impact of several landmark Supreme Court decisions, Gerald Rosenberg contends that the effects of *Roe v. Wade* have been modest at best, and certainly much less than most people (supporters and opponents alike) have assumed. Not only has its impact on increasing access to abortion been overstated, he argues, but more importantly for the argument of this paper *Roe* played a major role in mobilizing right-wing abortion opponents who have been able mitigate *Roe*'s intended impact in a number of ways.[119] Moreover, to many observers *Roe* did not merely generate the massive growth of pro-life forces, but also was responsible for the culturally reactionary strain of modern conservatism. As one puts it, "*Roe* galvanized a fledgling anti-abortion movement, which in turn fuelled the broader New Right movement."[120] The frequency with which claims about strong mobilization are attributed to *Roe* makes it a particularly good test case.

What makes *Roe* (unlike, for example, the Warren Court's reapportionment cases) an enduring example of the consequences of potential judicial overreaching is that the decision

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[114] Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985).

[115] MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA 408 (1994).

[116] BRADLEY C. CANON AND CHARLES A. JOHNSON, JUDICIAL POLITICS: IMPLEMENTATION AND IMPACT 12 (1998).

[117] FAYE GINSBURG, CONTESTED LIVES 15 (1989).

[118] SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 88 (2d Ed 1998).

[119] ROSENBERG, THE HOLLOW HOPE, supra note 17, at 197-8.

[120] ROBERT J. MCKEEVER, RAW JUDICIAL POWER? 93 (1993).

unquestionably generated a significant amount of opposition. In her justly influential book *Abortion & The Politics of Motherhood,* Kristen Luker described *Roe v. Wade* "as a bolt from the blue" that mobilized large numbers of pro-life activists and nationalized the pro-life movement.[121] The manifestations of the public's reaction to *Roe* are varied and easily evident. As Edward Lazurus describes the reaction when the Court in 1989 agreed to revisit *Roe* in *Webster v. Reproductive Health Services:*

> On January 23, 1989, the day after *Roe*'s anniversary and two days into the Bush administration, 70,000 anti-abortion protesters gathered on the Ellipse near the Washington Monument. After receiving a message of support from the new president, they streamed toward the Court in the largest of what had become their annual marches against *Roe.*
>
> On April 9, the pro-choice movement responded in kind. Aroused from years of *Roe*-induced complacency, 300,000 abortion rights supporters rallied on the same grounds that the right-to-lifers had occupied three months earlier, then made their way to the Court…
>
> Between competing demonstrations, both sides sought to breach the Court's outer walls through a barrage of letters. NARAL campaigned to send the Justices a million pro-choice postcards, while, on the other side evangelists exhorted their followers to give voice to the souls of *Roe*'s innocent victims, another million each year. At the height of the pre-*Webster* frenzy, the Court's mailroom handled a daily inundation of 45,000 letters, about forty-five times its usual load.[122]

Given the additional importance of abortion to the judicial confirmation process, there can be little question that *Roe v. Wade* generated some measure of countermobilization. As discussed previously, however, this is a necessary but not sufficient condition for the strong countermobilization hypothesis to be true. Given that *Roe v. Wade* entailed a major policy change and nationalized an issue previously fought at the state level, it is not surprising that pro-life opposition changed and grew more intense. The pro-life opposition, effectively described by Luker, confirms that claims (such as the Court made itself in *Casey*) that the Court can use its authority to legitimize conclusions to social disputes is inapplicable to the abortion politics in the United States, but it does not constitute evidence that commensurate legislative policy-making would have not produced a similar amount and quality of opposition. In order to assess the stronger version of the countermobilization thesis, it is necessary to compare abortion policy changes achieved through litigation to policy changes achieved through legislation.

Studying Countermobilization: Making the Relevant Comparisons

As argued above, there can be little question that *Roe v. Wade* mobilized a significant degree of opposition. However, it is important—not just to those interested in the abortion issue, but to scholars of judicial politics and the impact of judicial policymaking more broadly—to assess the extent to which this resistance was generated by unique institutional characteristics of the courts. One task at hand will be to understand the "divisiveness" generated by judicial decisions as opposed to that generated by legislatures. Another will be to understand how the resistance generated by *Roe*

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[121] LUKER, supra note 11, at ch. 6.

[122] EDWARD J. LAZARUS, CLOSED CHAMBERS 373 (1999).

gave voice to political movement within this comparative context. The mere fact of opposition may be sufficient to reject the hypothesis that the courts meaningfully resolved the abortion debate or created a consensus or widely accepted policy resolution, but it is plainly not sufficient to maintain the hypothesis that the courts are uniquely likely to engender opposition and exacerbate social divisions. To get leverage on the most interesting questions raised by the nature of countermobilization to judicial policy-making, comparing the effects of abortion policy-making by the courts and legislatures is absolutely essential. If courts simply generate (or fail to generate) opposition the same amount of opposition as legislatures when they engage in similar policy-making, then there is no reason for groups to avoid litigation because they fear an increased backlash, or for scholars of comparative law to think that judicial review will destabilize democratizing polities.

Making these comparisons, however, is not an easy task. It is impossible for any scholar to know with absolute certainty what effect on legislative establishment of the trimester framework of *Roe v. Wade* would have had. We can, however, place *Roe* within a comparative framework that can allow us to make inferences about the comparative effects of legislatures and courts. The most obvious basis for comparison is with the abortion reform at the state level immediately before *Roe.* Because of the lesser scope and slightly different time frame, this is by no means a perfect comparison. However, one advantage of this comparison is that to the extent that there are differences between the cases they generally work *against* my hypothesis. The hypothesis that the *Roe* generated unique resistance would imply that there would be less resistance generated by state reform than by federal reform, and less resistance generated by relatively modest reforms as opposed to wholesale invalidation of state laws; because of this, the comparison between *Roe* and state-level reform weighs heavily against my alternative theory. If episodic, piecemeal changes to abortion laws at the state level did not generate significant resistance, this would not be compelling evidence that changes of a scope truly comparable to the (relatively) uniform national policy created by *Roe* would not have generated similar resistance. However, if even modest state-level reform generated considerable resistance, the possibility that commensurate, more ambitious national changes to abortion laws would not have generated resistance is extremely remote.

Cross-national comparisons provide additional leverage. The Canadian case—in which a judicial opinion followed national reform legislation—is a particularly useful one. The comparison between reforms of commensurate national scope generated by different institutions provides a good testing ground for the strong countermobilization hypothesis. While there are some differences between the cases, most of these differences work in favor of the likelihood that court decisions will generate countermobilization. Because the *status quo ante* in the Canadian case was less restrictive than American law at the time of *Roe,* a backlash against the judicial intervention was even more likely.

Countermobilization Before and After Roe v. Wade*: State Reform of Abortion Laws and the "Tide of History" Narrative*

The dominant narrative describing state legislative activity with respect to abortion—it is exemplified by the arguments of both Ginsburg and Scalia, but it is a much more widespread perception[123]—in the years immediately before *Roe* is one of compromise and consensus shattered

[123] See, e.g., GUIDO CALABREISI, IDEALS, BELIEFS, VALUES AND THE LAW (1985); ROBERT BURT, THE CONSTITUTION IN CONFLICT (1992); ROGER ROSENBLATT, LIFE ITSELF: ABORTION IN THE AMERICAN MIND (1992).

by the Supreme Court's clumsy intervention. Perfectly captured by Rosenberg's metaphor of "the tide of history,"[124] the argument presumes that a widespread, substantial level of reform was ineluctable. States were reaching a consensus on a state-by-state basis, in a way that effectively (if slowly, perhaps, but nobody has claimed that American political institutions are designed for maximum efficiency) both reflected changes in public opinion and generated results that resulted in less divineness and opposition. Prior to *Roe,* Rosenberg argues, pro-choice activity was "widespread, vocal, *and effective*"[125] (1991, p. 264. And the Court's action to bring about what would have occurred in due time anyway pre-empted social compromise and made rational resolution of the argument impossible. "A decision leaving abortion regulation basically up to state legislatures," Glendon argues, "would have encouraged constructive activity by both sides."[126]

If this narrative is correct, it would constitute a powerful *prima facie* case for the hypothesis that courts are more likely to produce countermobilization. Again, there can be little question that *Roe* has produced significant opposition; if opposition was much less prevalent in response to legislative reform. The case for the strongest version of the countermobilization hypothesis would be, if not clinched, at least entitled to a strong presumption in its favor. However, this common narrative of pre-*Roe* abortion politics is largely erroneous. Legislative reform was much more modest and resulted in legislation that was much further from majority public opinion than is generally accepted. More importantly, state-led reform had virtually ceased by 1972, and an anti-abortion backlash manifested itself clearly in some state legislatures as well. Other possible measures of countermobilization—qualitative studies of abortion politics in the states, public opinion, and the salience of the abortion question among movement conservatives—are also inconsistent with the strong countermobilization hypothesis.

Abortion law in the states and the "countermajoritarian difficulty"

It is somewhat surprising, in examining the legislative status of abortion in the states in January 1973, how few states had legalized (or even significantly lowered legal barriers to) abortion[127]:

- Decriminalized abortion: 4 states, and D.C.
- Abortion permitted to protect woman's health, at the discretion of her doctor: 13 states.
- Abortion permitted only to save woman's life: 30 (+rape exemption in MI).
- Abortion prohibited in all circumstances: 3 states.

[124] ROSENBERG, THE HOLLOW HOPE, *supra* note 17, at ch.9.

[125] Id. at 264.

[126] MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 47 (1987).

[127] Data derived from CRAIG AND O'BRIEN, supra note 109, AT CH. 3.

This legislative *status quo ante* does not, in and of itself, contradict the strongest version of the countermobilization hypothesis, but the strong skewing of the legislative reform "consensus" toward the pro-life position has some important implications for the question at hand. First of all, from a methodological standpoint, the status of state law before *Roe* further biases the comparison between state reform and liberalization via the courts in favor of hypothesis that the policy-making of courts is more divisive. Even if there was (in general) little meaningful opposition to reform at the state level, given that the vast majority of these reforms kept abortion formally illegal in most circumstances, one could not necessarily infer from this that state laws that (like *Roe*) legalized first-trimester abortion would also not generate a large amount of opposition.

More importantly, however, the legislative status quo at the state level is illustrative of significant flaws in the strain of the argument that holds that judicial review is likely to generate more opposition because it usurps the will of majoritarian legislatures. The most obvious error is simply that the political branches in the American system are not "majoritarian."[128] As Graber points out, the abortion case is more plausibly conceived as presenting not a "countermajoritarian" difficulty but a "non-majoritarian" difficulty.[129] This has two aspects. First of all, because abortion is an issue that cross-cuts traditional party coalitions, political actors will often defer policy-making decisions to other actors, including the courts. Secondly, as the fact that most states had not legalized abortion in spite of a shift in public opinion favoring much more liberal abortion laws attests,[130] legislatures in the American system are not designed to (necessarily) embody the policy preferences of majorities and not surprisingly sometimes fail to do so in practice. Far from reflecting the legislative enactment of a newly formed consensus of the public, abortion law in the states before *Roe* was instead rather strikingly illustrative of one of the definitive features of Madisonian institutions: a determined, well-organized minority prevailing over a more diffuse majority. As Tatalovich and Daynes note, "the abortion issue is one in which [an] intense minority is willing to commit vast amounts of resources to defeat a proposal that the majority supports with only moderate enthusiasm."[131] In the context of American constitutionalism it would, of course, be profoundly misleading to argue that state abortion policy was less "democratic" than the resolution made by the Supreme Court; American political institutions are designed to place drags and checks

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[128] For further elaboration of this point, see SHAPIRO, supra note 96; PERETTI, supra note 96; Lovell supra note 89. It is true that—at least after the Supreme Court's decision in Reynolds v. Sims, citation, which required states to re-apportion their Senates on a one-person one-vote basis—state legislatures are somewhat more "majoritarian" then the federal government. But the due to separation of powers between bicameral legislatures (with the exception of Nebraska) and the executive, state legislatures still cannot be meaningfully described as "majoritarian." Features of institutional design such as the separation of powers between the executive and legislative branches and the gate-keeping roles of committee chairs plainly mitigate against the translation of majority preferences into law.

[129] Graber, supra note 39.

[130] See ROSENBERG, supra note 17 260-62.

[131] RAYMOND TATALOVICH AND BYRON W. DAYNES, THE POLITICS OF ABORTION: A STUDY OF COMMUNITY CONFLICT IN PUBLIC POLICY MAKING 75 (1981).

on public opinion. The consonance of legislation with the majority's preferences is not necessarily proof of either its empirical or normative legitimacy. But when analyzing the potential for countermobilization, it is surely relevant that the court (as I will elaborate further when evaluating public opinion after *Roe*) was *closer* to the majority of the public than the states were. There is little reason to believe that most people place a greater priority on the congruence of political institutions to Alexander Bickel's theory of democratic accountability than on their own policy preferences. Even if the courts are more apt to reflect "countermajoritarian" positions than legislatures—a highly questionable claim— "countermajoritarian" is not a particularly useful description of the court's action in *Roe v. Wade*.[132]

The Turning of the Tide: The Stalling of Abortion Liberalization, 1971-2

> "The extremes of personal vilification and political coercion brought to bear on members of this Legislature raise serious doubts that the votes to repeal the reforms represented the will of a majority of the people of New York State."
>
> —Gov. Nelson Rockefeller, vetoing a repeal of New York's liberalization of abortion law, May 1972.[133]

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[132] As Powe points out, even the Warren Court—the modern court most often associated with "countermajoritarian" Supreme Court activism—is in many respects much better described as a majoritarian force within the dominant Democratic governing majority. POWE, supra note 47, at 495-8. The bulk of its most famous decisions—most notably, Brown v. Board of Education, Griswold v. Connecticut, Gideon v. Wainwright, and Baker v. Carr—are much better explained as a national consensus being mobilized against outlying states, even if the cases' narrow effect was to protect individual rights against the state. Roe is not fully comparable with these cases because the changing national consensus was not reflected in a majority of state legislatures, and public opinion about abortion was (and is) far more complex and closely divided than it was about contraception. Nevertheless, Roe strikes me as closer to Powe's conceptualizing of the Court's role than to Bickel's assumption that the court will act in a "countermajoritarian" way. In most states, it was the Supreme Court, not the state government, that was closer (for better or worse) to the majority view. For the classic argument about the court as a majoritarian institution, see Dahl, supra note 107. But see Jonathan Casper, The Supreme Court as a National Policy Maker AM. 70 POLITICAL SCIENCE REV (1976); KEITH E.WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 41-4 (2007).

[133] Quoted in DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 546 (1994).

The "tide of history" narrative retains its plausibility because underlying it is a claim that is literally true—the five years prior to *Roe* saw a significant number of states make their abortion laws less restrictive. Even conceding that the end result of this reform left a vast majority of state laws highly restrictive, the *general trend* toward the liberalization of abortion laws might still suggest that many states with highly restrictive laws could be expected to either decriminalize or significantly lessen the restrictions on procuring abortions within a fairly short period of time. Such a pattern, if it existed, would also be consistent with a relatively consensual decision-making process. However, the distribution of state liberalization during this period of time was not uniform, but in fact almost always took place within an initial three-year wave. When one examines the two years prior to *Roe,* it is clear that there was not an active national trend toward abortion reform law at the time that *Roe* was decided (*see* Figure 1.)

Figure 1: Legislative Stalling and Retrenchment, 1971-2

- Reform legislation fails in more than 10 states
- Reform referenda fail in MI and SD
- Reform legislation passed in 1 state (FLA)
- Restrictive abortion legislation passed by legislatures in NY, PA, and CT after abortion bans were repealed or struck down by state courts

Legislation to retract previous reform legislation vetoed by the governor in NY and PA

By the time of *Roe v. Wade,* the brief trend at the state level toward liberalizing abortion laws had almost completely stalled. In 1971 and 1972, attempts at liberalization failed in Texas, Georgia, Illinois, Maine, Ohio, North Dakota, South Dakota, Michigan, Missouri, Oklahoma, Massachusetts, and Indiana; liberalization referenda had failed in Michigan and North Dakota. When Florida's liberalization law passed in April 1972 it was the first abortion reform to be passed by state legislatures in 18 months. Moreover, there was significant retrenchment in several states. The initial repeal of New York's abortion laws in 1970 was followed by the passage of a significantly more restrictive law by the legislature only two years later, which was defeated only by Nelson Rockefeller's veto.[134] A similar situation transpired in Pennsylvania, where "passage of an extremely restrictive new antiabortion law in Pennsylvania— allowing those abortions judged necessary to save a woman's life by *three* doctors—was averted only by Martin Shapp's gubernatorial veto."[135]

When one examines the trend *within* the time period before *Roe,* the problematic nature of the "tide of history" narrative is easily seen. The perception that abortion reform at the state level was a steady, ineluctable trend is, ironically, a purely retrospective one created by *Roe v. Wade.* The

[134] CYNTHIA GORNEY ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 180 (1998); ROSEMARY NOSSIF, BEFORE ROE: ABORTION POLICY IN THE STATES 77-105 (2001).

[135] GARROW, supra note 134, at 578.

contemporaneous reality and perception of the balance of power between pro-choice and pro-choice groups at the state level was very different. On one hand, in 1971 Lee Gidding, the executive director of the National Association for the Repeal of Abortion Laws (NARAL), declared that "those of us on the inside know what a beating the opposition dealt us this year."[136] The pro-choice movement became increasingly disillusioned and frustrated by the failure of liberalization in the states (which, of course, made litigation a more attractive and viable strategy.)[137] On the other hand, the pro-life movement was increasingly pleased with the policy outcomes of the period. Reacting with premature, but in the context of the time entirely understandable, triumphalism in the *National Review,* Russell Kirk declared in the wake of the failure of the Michigan and North Dakota legalization initiatives that "one political issue about which we'll hear much less for three or four years—or ever again, conceivably—is abortion-on-demand."[138]

This nearly comprehensive routing of pro-choice interests at the state level from 1971-1972 is, in and of itself, powerful evidence that there was significant countermobilization at the state level. Given the increasing consensus among medical and legal elites in favor of liberalization, and the initial success of reform legislation, it would be remarkable if the trend had stopped without significant countermobilization on the part of pro-life groups. And, indeed, studies of legislative reform in the states confirm the emergence of an effective pro-life countermobilization.[139] While in a few states early in the process—most notably the reform bill passed in North Carolina in 1967[140]—abortion remained a relatively low-salience issue where liberalization met minimal opposition, by 1970 such legislative contexts were virtually non-existent. The hardiness of opposition to abortion liberalization at the state level is effectively characterized by a pro-choice activist who, after the overwhelming defeat of the Michigan reform initiative (despite promising early polls), noted that pro-life groups "had mustered 'a tremendous grass-roots organization we couldn't begin to match.'"[141] The pro-life movement, in other words, was clearly not "brought into being" by *Roe v. Wade*. The mobilization for the liberalization of laws in most states met with a well-organized opposition that succeeded in moderating reforms or thwarting them altogether. In these legislative skirmishes, as Rubin notes, "both proabortion and antiabortion forces [were] strong, emotional, and well organized."[142]

Of course, the "rights-talk" variant of the "judicial exceptionalism" literature implies that judicial intervention will produce not just a higher *quantity* of opposition, but a different *quality* of opposition. Evidently, addressing the latter question is more difficult. I certainly do not argue that

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[136]Id. at 507.

[137] See EVA RUBIN, ABORTION, POLITICS AND THE COURTS: ROE V. WADE AND ITS AFTERMATH ch. 1(1982); GARROW, supra note 34, at ch. 8.

[138] Russell Kirk, The Sudden Death of Feticide, 22 NATIONAL REVIEW, 1407 (1972).

[139] See RUBIN, supra note 138; GARROW, supra note 138; GORNEY, supra note 135; ROSEMARY NOSSIFF, BEFORE ROE: ABORTION POLICY IN THE STATES (2001).

[140] See RUBIN, supra note 138, at 27; GARROW, supra note 138, at 327-29.

[141] GARROW, supra note 138, at 577.

[142] RUBIN, supra note 138, at 24.

one can make meaningful empirical claims with respect to the extremely fine distinctions drawn by Glendon between the "intense discussion" generated by legislative reform and the "sense of desperate embattlement"[143] generated by *Roe*. In general, however, qualitative studies of reform at the state level suggest that the level of "divisiveness" in abortion discourse was high. Studies of unsuccessful drives for state referenda liberalizing abortion in Michigan and North Dakota in 1972,[144] various legislative attempts to adopt reforms permitting "therapeutic" abortions in Missouri,[145] and the ultimately successful legislation repealing abortion bans in New York,[146] were accompanied by uncompromising, emotionally charged and often bitter rhetoric on both sides of the debate. There is simply little reason to believe that legislative changes in abortion law were necessarily stable and consensual, characterized by pro- and anti- abortion factions viewing final legislation as a mutually acceptable compromise. For example, Nossiff's study of the attempts to reform abortion law in Pennsylvania, far from finding a discourse of compromise and consensus, instead demonstrates a heated and divisive political conflict. The Pennsylvania Catholic Conference (PCC), the major anti-abortion force in state politics at the time, "waged a meticulous campaign against abortion reform," and in the course of this battle their discourse "sought to cast abortion reformers as dishonest and morally suspect."[147] Similarly, the debate in the New York assembly that lead to abortion being recriminalized was "highlighted by one opponent's display of a fetus in a jar."[148] The status of abortion as a difficult, highly charged moral and political issue was manifest well before the Supreme Court's intervention into the national debate. And by the time *Roe v. Wade* was announced pro-life opposition was effectively mobilized.

Abortion and the "New Right"

Another potential piece of evidence of countermobilization to *Roe v. Wade* is the increasing importance of abortion to the "New Right" that has become increasingly prominent in Republican politics.[149] If *Roe v. Wade* was the crucial factor in creating modern conservatism this would indeed be

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[143] This phrase is quoted by GLENDON, supra note 127, from CALABRESI, supra note 124, at 97.

[144] See GARROW, supra note 138, at 576-78.

[145] GORNEY, supra note 135, at ch. 2-3.

[146] LAWRENCE LADER, ABORTION II: MAKING THE REVOLUTION ch. 10-11 (1973).

[147] NOSSIFF, supra note 140, at 109.

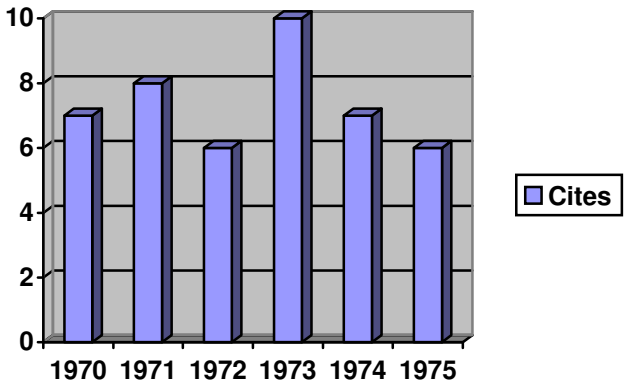
[148] GARROW, supra note 138, at 546.

[149] Following McGirr, I use the term "New Right" to refer to movement conservatives who combine economic beliefs focused on an "opposition to liberal 'collectivism'" with a cultural worldview opposed to "what [is] perceived to be a decline in religiosity, morality, individual responsibility, and family authority." LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT 10 (2001).

an important counter-mobilizing effect. Craig and O'Brien[150] and Ginsburg,[151] for example, identify the New Right with the rise with Jerry Falwell's Moral Majority and identify them as joining the anti-abortion movement in force in the late 1970s. However, there is strong evidence that both the "New Right" itself and its close relationship with the anti-abortion movement significantly predate the Carter Administration. The roots of the New Right can be found in McCarthyism and Barry Goldwater's successful campaign to win the Republican presidential nomination in 1964.[152] While the salience of various issues and their relative strength within the Republican Party has waxed and waned, the New Right has maintained a consistent presence in American politics throughout this period. And while the opposition to the liberalization of abortion laws was in the incipient stages of the movement located largely within the Catholic Church, grassroots members of New Right organizations were a strong part of the anti-abortion coalition well before *Roe v. Wade*.[153]

Another means of demonstrating the extent to which abortion was important to movement conservatives even prior to *Roe* is to look at the number of articles written about abortion in the *National Review,* the flagship journal of the New Right and movement conservatives, and *Christianity Today,* the most prominent journal of politically active religious conservatives. A review of citations for these two journals in the *Reader's Guide To Periodical Literature* database shows that there were almost as many articles about abortion in the three years prior to *Roe* than in the three years subsequent to *Roe*:

Figure 2: *National Review* and *Christianity Today* Articles on Abortion, 1970-75



[150] CRAIG & O'BRIEN, supra note 109, at 52-54.

[151] FAYE GINSBURG, supra note 118, at 46-49.

[152] See, e.g., DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS (1995); MCGIRR, supra note 150.

[153] See DALLAS BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIERY PROTEST (1994); MCGIRR, supra note 150, at 231-36.

As the above data indicates, well before the Supreme Court's critical decision, abortion was firmly on the radar screen of this important segment of the New Right. A small, but noteworthy, spike appears in the year of *Roe v. Wade*, but there were actually more articles about abortion in the period of 1970-71 than in 1974-75.[154] The results are plainly inconsistent with the argument that *Roe* "created" the opposition to abortion as an issue for movement conservatives.

Of course, the simple quantity of articles about abortion is an insufficient measure of the potential countermobilization to *Roe*, as the "rights-talk" variant of the particularity of legal discourse posits that litigation changes the *tone* as well as the *salience* of issues. A content analysis of the articles written about abortion in the *National Review* prior to *Roe*, however, provides ample evidence that abortion was a highly divisive issue for the New Right before the Supreme Court nullified state legislation in early 1973. A number of articles written by New Right patriarchs Russell Kirk and William F. Buckley Jr. denounce liberalized abortion laws, using language strikingly similar to that used by Justice Scalia in his dissent in *Stenberg v. Carhart*[155] (which compared *Roe* to *Korematsu* and *Dred Scott*): drawing inflammatory analogies between abortion (sometimes described using the term "feticide") and the worst crimes of humanity. Quotes from two articles written in 1971 provide striking examples. "If babies in the womb may be killed upon a whim or a misgiving," wrote Kirk, "why should a society respect at all the old religious injunction against murder?"[156] Going even further, Buckley opined that there is "no more reason to disguise the proceedings of abortion centers than there is to pretend that one does not know the whereabouts of Auschwitz;"[157] Buckley also called the anti-abortion movement "the Resistance."[158] In general, the New Right's rhetorical framing of the abortion debate prior to *Roe* bore little resemblance to the moderate, consensual rhetoric that scholars concerned about the divisive impact of litigation implied was the alternative to the stark conflict of rights discourse.

Perhaps even more importantly in terms of assessing the impact of countermobilization, pre-*Roe* articles were not simply abstract ethical or political arguments. Several of the articles explicitly considered issues of activism and how best to strategically oppose the perceived trend towards the liberalization of abortion laws in the states. In a 1971 article entitled "How to Protest Abortion," Buckley outlined a three-pronged anti-abortion strategy that in retrospect seems as familiar as gravity: first, to engage in the "'round the clock picketing of abortion centers"; second, to force office-seeking public officials to make their stand on abortion a matter of public record and using it as a litmus test for support; and third, to "sponsor writers and speakers, theologians and lay-moralists, whose words would be heard on television and radio, in newspapers and in the learned journals" (1971b, p. 445). Given Buckely's strong connection to conservative political elites, it is manifestly clear that the "divisive" strategies deployed by anti-abortion groups had their genesis in the legislative struggles prior to *Roe*; however valuable *Roe* was for the New Right as an *ex post facto*

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[154] This data was collected by entering the search term for the subject "abortion" into the electronic archives of the Reader's Guide to Periodical Literature.

[155] 530 U.S. 914 (2000) at 954.

[156] Kirk, supra note 138 at 315 (1971).

[157] William F. Buckley, How to Protest Abortion, 22 NATIONAL REVIEW 444, 445 (1971).

[158] William F. Buckley, Abortion, the Crunch, Volume NATIONAL REVIEW 444 (1971).

framing device, the nature and basic strategies of anti-abortion groups were not simply catalyzed by the Supreme Court's intervention.

Roe v. Wade and "Rights-talk"

William Buckley's comparison of abortion with the Holocaust usefully indicates a problematic aspect of the argument that *Roe*, by framing the debate in terms of "rights-talk," increased the "divisiveness" of the abortion debate. Such claims about rights are only meaningful if contrasted with the nature of other prevalent discourses. Even if one accepts the highly problematic premise that rights discourse, at least in its "legalistic" American form, is the "language of no compromise," the same uncompromising absolutism can be seen in the other religious and moral discourses that echo within the abortion debate. The claim, for example, that "abortion is murder" immediately forecloses potential compromise. There is little reason to believe *a priori* that legalistic rights discourse will increase the divisiveness of the abortion issue. Moreover, the decision in *Roe v. Wade* provides an almost uniquely compelling example of how legal institutions use many discourses other than those centered around rights. As innumerable critics have noted, *Roe*'s discussion of constitutional rights is vague and perfunctory, and any assertion of women's rights is almost entirely absent. The bulk of *Roe* consists, rather, of a generally technocratic medical, philosophical, and legal history of abortion. Just as rights can play a major role outside of legal institutions, rights discourse is not necessarily dominant within legal institutions.

In addition, to the extent that it asserted an individual rights claim against the state, *Roe* is useful in indicating that rights discourse is not necessarily uncompromising. Like the European statutes preferred by Glendon, *Roe* (and the Court's subsequent abortion decisions) have allowed the states to regulate abortion in a myriad of ways,[159] and *Roe* (as well as the subsequent decisions upholding it) have also recognized that abortion rights had to be balanced against the state's potential interest in protecting fetal life. It differs in the latter respect by drawing the line in a manner that places much more weight on the right to abortion, but this is not the same as arguing that no balance was necessary. (Nor was the particular balance reached by the Court in *Roe* inevitable; the Courts could have given the states more leeway, just as legislatures can make abortion wholly legal or ban it outright.) Moreover, this balancing of rights with other rights and other interests, far from being unique, is common in constitutional jurisprudence to the point of banality.[160] Finally, even if one accepts the highly contestable premise that European abortion policy is "consensual," it is far from clear that this can be traced to the prevalence of rights discourse in the United States. As Graber points out, Glendon's comparative study focuses almost entirely on formal law, which is a very limited slice of a country's general abortion discourse and does not necessarily reflect abortion access on the ground.[161] And, in fact, Maree et. al's study of German abortion law

[159] See CRAIG & O'BRIEN, supra note 109 at 351-52.

[160] As Hiebert explains, this is particularly evident in Section 1 of the Canadian Charter of Rights and Freedoms, which allows that rights are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *See* JANET HIEBERT, LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW (1996). This clause, however, merely makes explicit what is consistently and inevitably present in constitutional jurisprudence.

[161] GLENDON, supra note 127, at 18-19.

"in action" demonstrates that German abortion discourse is, if anything, even more saturated with rights-talk than American abortion discourse.[162] There is, in the final analysis, little (if any) evidence to support the proposition that *Roe* generated particularly large amounts of opposition by injecting rights into the abortion debate.

Public Opinion and the Legitimacy of the Supreme Court

A final major measure of countermobilization can be found in studies of public opinion. Two major findings can be summarized. First, the legislative status quo in January 1973 did not (for better or worse) represent the majority of the public, at least as measured by public opinion surveys. To recapitulate, the vast majority of states banned abortion either outright or with the exception of cases in which the woman's life was in danger. However, overwhelming majorities favored exemptions for instances when the pregnancy was the result of rape or threatened the *health* of the mother,[163] and according to a January 1972 Gallup poll 57% of Americans thought that abortion "should be left to a woman and her doctor."[164] While neither *Roe* nor the *status quo ante* it displaced were by any means a precise mirror of public opinion, the Court's policy was almost certainly closer to the median voter than the policies of the state legislatures, making the possibility of a strong countermobilization significantly lower. And, indeed, *Roe v. Wade* has not significantly shifted public opinion either way. Between 1972 and 1991, of the six questions asked in the National Opinion Center's annual abortion survey, three showed more support for abortion, three showed less, and for none of the questions did opinion shift by more than six points.[165] This is true even in the period immediately following *Roe.* Wetstein's study of abortion attitudes found that "relatively stable attitudes on abortion were evident during the four years (1972-1976) when abortion policy was in transformation in this country."[166] Marshall's study of the reaction to Supreme Court decisions showed a small increase in the public's support for abortion in the wake of *Roe.*[167] In addition, the public has generally supported *Roe* itself. A 1989 survey showed that, in spite of the election of a pro-life president the previous year, 62% of respondents favored maintaining *Roe* and only 32% favored overturning it.[168] This roughly 2-to-1 split in favor or Roe remains in place in 2007.[169] If

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[162] MYRA MARX MEREE ET AL. SHAPING ABORTION DISCOURSE 114-5 (2002).

[163] CRAIG & O'BRIEN, supra note 109, at 250. The tally was 86%-14% in favor of a health exemption, and 79%-21% in favor of a rape exemption.

[164] GARROW, supra note 138, at 539.

[165] CRAIG & O'BRIEN, supra note 109. at 250, 254)

[166] MATTHEW WETSTEIN, ABORTION RATES IN THE UNITED STATES: THE INFLUENCE OF OPINION AND POLICY 73 (1996).

[167] THOMS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 147 (1989).

[168] It should be noted, however, that according to this survey the sentiments of those overturning Roe were held more intensely. On the other hand, the polling data subsequently cited by Craig and O'Brien suggests that this increased

anything, *Roe* polls *better* than its underlying policy conclusions, which is precisely the opposite of what the countermobilization hypothesis would seem to expect. All of this data is consistent with Paretti's argument that, to the extent that the court gains or loses legitimacy in the eyes of the public, it is because of the results of its opinions, and not the legal reasoning or the fact that it "usurped" the will of the legislature. In general, the public has virtually no knowledge or interest in the legal reasoning behind opinions, and it evaluates the decisions of the courts just as it would evaluate that of the political branches.[170] There is no reason to believe that Peretti's general finding is contradicted in the specific case of *Roe*.

The study of public reaction to Supreme Court opinions by Johnson and Martin could potentially provide one piece of evidence in favor of the strongest versions of the countermobilization hypothesis.[171] While public opinion in the years after *Roe* did not change in its median, it did become more *polarized*. This would, at least, be consistent with the theory that judicial activism would create a more "divisive" form of resistance. However, evaluated as a whole, the Johnson and Martin study is nonetheless more consistent with the claims of the skeptics of legal exceptionalism than with the strong versions of the countermobilization hypothesis. If *Roe* polarized opinion because it was an act of the court and not the legislature, one would expect a similar polarization of opinion to occur in the wake of the court's highly controversial refusals to overturn *Roe*. However, public opinion following the court's decision in *Webster v. Reproductive Health Services* did not significantly change either in terms of its distribution or in terms of its polarization. This makes it more plausible that the polarization in public opinion that followed *Roe* was a result of the *nationalization* of the abortion issue rather than because it was a policy-making by the courts *per se*. After all, debates over state-level reforms created significant polarization before *Roe*. The pro-choice and pro-life movements—and hence activism across distributions of public opinion—sprouted as abortion became a public issue from 1968-1972. There is no reason to believe that a simultaneous legislative liberalization of all state laws in 1973 would not have had the same effect, or perhaps even created additional polarization. And, overall, there is no evidence that the public became more hostile to abortion rights because of *Roe v. Wade*. As Ladd and Bowman argue in their comprehensive study about public opinion on the abortion issue in the United States, "[o]pinion on abortion remains very much what it was in 1973 when the *Roe v. Wade* decision was handed down."[172] Overall, the public opinion data strongly suggests that "attitudes in the mass public are unlikely to be greatly swayed by recent or forthcoming court decisions."[173]

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intensity of feeling did not translate into a significant degree of increased political activism. CRAIG & O'BRIEN, supra note 109, at 261.

[169] See http://www.pollingreport.com/abortion.htm. Site last accessed September 11, 2007.

[170] PARETTI, supra note 96, at 161-88.

[171] TIMOTHY JOHNSON & ANDREW MARTIN, THE PUBLIC'S RESPONSE TO SUPREME COURT OPINONS 92 AM. POL. SCI. REV. (1998).

[172] EVERETT LADD & KARLYN BOWMAN, PUBLIC OPINION ABOUT ABORTION: TWENTY-FIVE YEARS AFTER ROE V. WADE 17 (1997).

[173] See WETSTEIN, supra note 167, at 73.

Summary

In general, the comparison of abortion politics before and after *Roe v. Wade* is most consistent with the expectations held by skeptics of judicial exceptionalism. Clearly, the legitimation hypothesis is not applicable in the abortion case. The court's intervention certainly did not resolve the abortion issue in any meaningful sense, and the public certainly did not accept the court's verdict as the final word on the issue. On the other hand, there is also little evidence that the court's action would have produced *more* countermobilization than a similar policy enacted by Congress or state legislatures. The pro-life movement was a powerful force before *Roe,* and the decision did not demonstrably change either the tone of abortion discourse or the distribution of public opinion on the issue. There is no evidence, specifically or generally, that policy-making by the courts is thought of as inherently illegitimate by the public. It should be re-emphasized that these empirical findings do not mean that there was *no* countermobilization against *Roe*. My empirical claims are consistent with the findings of Luker's study of the pro-life movement;[174] just as attempts at state reform mobilized the pro-life movement, so one would expect the Supreme Court's nullification of state statutes to mobilize grassroots support. These findings are also consistent with Brigham's claim that *Roe* "made the Pro-Life movement into a *national* force."[175] Certainly, abortion politics are more salient at the level of presidential politics in 2003 than they were in 1972 when George McGovern declined to take a position on the issue.[176] The comparison of abortion politics before and after *Roe,* however, compels the strong inference that it is the *nationalization* of abortion politics represented by *Roe,* and not the *legalization* of politics, that is the key variable in explaining this shift. Hypothetically, had Congress passed (and been constitutionally able) to pass legislation with similar policy content, there can be little question that abortion would have become a more salient issue in presidential politics as well.

Where's the Backlash? Abortion Politics and the Courts in Canada

While useful in many respects, there are many evident limitations in examining the American case history for abortion reforms and opposition as a stand alone entity. The comparison between federal and state reform does not provide truly commensurate cases, as there are unique aspects of abortion politics in the United States that cannot be brought to relief through the intra-national comparison. A brief examination of another case can provide a more complete picture. An interesting comparison to US abortion reform movement can be found in Canadian national legislative reform, which was struck down by the country's Supreme Court. Because Canada had both legislative and judicial policy-making at the national level, it provides a particularly useful case study. If the premise of the strong countermobilization hypothesis is correct, we would expect Canada to have equally or more divisive abortion politics than the U.S., as well as a highly mobilized pro-life movement.

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[174] LUKER, supra note 11.

[175] JOHN BRIGHAM, THE CULT OF THE COURT 30 (1987) (emphasis added).

[176] See CRAIG & O'BRIEN, supra note 109, at ch. 5.

Judicial Nullification of National Legislative Reform in Canada

After the Canadian Supreme Court struck down compromise national abortion legislation that had been enacted in 1969 in *R. v. Morgentaler,*[177] many observers feared that abortion politics in Canada would become as salient and openly contentious as abortion politics in the United States. Assessing the immediate aftermath of *Morgentaler,* one scholar offered an analysis which almost precisely reflects the premises of the strong countermobilization hypothesis: "…the polarizing effects of rights talk is at work in the Canadian body politic…after the decision, the rights talk inspired by the Charter encouraged moralistic confrontation and encouraged opposition."[178] As a contemporary assessment this was a plausible case. Given that the Court struck down not a patchwork of state laws (that, as a whole, lagged well behind public opinion) but compromise legislation that was enacted at the national level, an even greater backlash was possible. Moreover, by striking down the abortion law in its entirety, the Court left Canada with arguably the most liberal abortion policy in the world, opening up plenty of political space for potential opponents. Indeed, if one accepts the central premises of the strong version countermobilization hypothesis, Canada seemed particularly likely to suffer a strong reaction against the court. However, with perspective lent by the passage of time, it is clear that this analysis was incorrect. Despite suffering a major backlash, abortion policy in Canada has been remarkably stable, with strong public support for the Court's policy-making and abortion not becoming an especially salient issue in federal elections.

The response of the Canadian legislature is reflected in two stages: deferral of the government to the judiciary[179] and stable acceptance of the status quo. The *Morgentaler* decision left significant room for Parliament to regulate abortion in a non-arbitrary manner, hence giving space for any latent legislative majority for opposing the Court to emerge. The ruling Conservative government, however, responded by allowing the Courts to set policy. First, the Mulroney government put forward a strong symbolic signal by appointing a Justice Minister (the member of the cabinet whose portfolio is responsible for abortion legislation) who was perceived as sympathetic to reproductive rights, an appointment which was duly perceived as an act of hostility by pro-life groups.[180] Secondly, in its first two attempts to pass legislation, the government allowed extremely unusual "free votes" in which legislators were not bound by party discipline, and predictably no legislation passed. (In the Canadian system, the rare choice by the government to hold a "free vote" is in itself a strong indicator of a legislative deferral to the courts. Free votes are generally reserved for the type of divisive moral questions—such as the death penalty, abortion, and gay rights—that a governing party wishes to avoid responsibility for resolving.) In its third attempt the Conservative government passed a mildly restrictive reform bill with Cabinet ministers (but not

[177] 1 S.C.R. 30 (1988)

[178] F.L. MORTON, PRO-CHOICE VS. PRO-LIFE: ABORTION AND THE COURTS IN CANADA 313 (1993).

[179] I use the term "deferral" here to describe cases in which "elected officials empower the courts to make instrumental use of judicial power as a way of attaining settled policy goals." George Lovell and Scott Lemieux, Assessing Juristocracy: Are Judges Rulers or Agents?, 65 MARYLAND L. REV. 111 (2006).

[180] SYLVIA BASHEVKIN, WOMEN ON THE DEFENSIVE: LIVING THROUGH CONSERVATIVE TIMES 192-93 (1998).

backbenchers) bound by party discipline, but allowed the bill to be defeated by the essentially vestigial Senate.[181]

The unwillingness of the government to legislate, however, can conceivably be explained in a way consistent with the strong countermobilization hypothesis. Knopff and Morton argue that "[t]he failure in Canada of the type of compromise common in Europe was no doubt attributable in some part to the climate of polarized intransigence promoted by the black-and-white, rights-based quality of Charter litigation."[182] This claim, however, is problematic for several reasons. First of all, to an even greater extent than *Roe*, *Morgentaler*'s plurality opinions relied on very narrow technical grounds which carefully weighed procedural rights with state interests. Even the substantive equality claim found in Judge Wilson's concurrence acknowledged a state interest in fetal rights. The abortion jurisprudence of the United States and Canada makes it quite clear that rights discourse is *not* necessarily one of black-and-white contrasts. Secondly, it is difficult to explain why a "climate of polarized intransigence" would prevent the legislation from re-submitting legislation but not from passing it in the first place, as the Westminster institutional framework gives the executive extremely broad latitude to pass legislation it is committed to seeing enacted. Finally, there is little evidence that Charter litigation has prevented legislatures from responding when they choose. Hiebert's case study of Parliamentary responses to exercise of judicial review demonstrates that in cases such as regulations of tobacco advertising, laws governing sexual assault, and laws governing the collection and use of DNA that Parliament has been able to successfully enact legislation addressing similar goals after legislation has been nullified by the courts (and without using their powers to override judicial opinions.)[183] The fact that legislation was not passed after *Morgentaler* is much more effectively explained by the traditional pattern of delegating and deferring the abortion issue than by a new climate created by the Charter.

Since the defeat of the Tories in 1993, the Canadian case is even less consistent with the strong countermobilization hypothesis. Despite the fact that the most formally liberal abortion regime among liberal democracies had been created through judicial intervention, the Liberal Chrétien and Martin governments did not attempt to pass abortion legislation. Perhaps more importantly, the Reform Party,[184] which became the dominant right-wing opposition party after the collapse of the Conservatives in the 1993 election, rather than including a pro-life plank in its

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[181] For a full account of Conservative attempts at passing abortion legislation, see TATALOVICH, supra note 132, at ch. 3; Thomas Flanagan, The Staying Power of the Legislative Status Quo: Collective Choice in Canada's Parliament after Morgentaler, 30 CANADIAN J. POL. SCI. 31. (1997).

[182] RAINER KNOPFF & F.L. MORTON, CHARTER POLITICS 290 (1992).

[183] HIEBERT, supra note 161. Section 33 of the Charter of Rights and Freedoms permits legislation to be passed "notwithstanding" most of the substantive rights provisions of the Charter. The clause, however, has never been used by the federal government to override a substantive rights decision by the Supreme Court. See CHRISTOPHER MANFREDI, JUDICIAL POWER AND THE CHARTER (2000).

[184] This party, which remains the primary conservative opposition, subsequently became known as the Canadian Alliance, and has now joined with the former Progressive Conservatives to form the new Conservative Party.

platform instead advocated leaving "moral issues" such as abortion to a national referendum, with full knowledge that public opinion did not support most abortion restrictions. The new Conservative Party created in 2004 as the result of a merger between the Canadian Alliance (the successor of the Reform Party) and the Progressive Conservatives jettisoned even the promise of a referendum on the issue, taking no position on abortion at all.[185] Prodded consistently about abortion during the 2004 Prime Ministerial debates, Conservative leader (and future Prime Minister) Stephen Harper declared that "I am not going to enact a law on abortion. I intend to respect the right of abortion."[186] Nor has Harper's ascension to the Prime Ministership in 2005 produced any change in abortion policy or even attempts to change the status quo.

The decision of Canadian conservatives to essentially punt the abortion issue in and out of office is plainly inconsistent with the hypothesis of a strong countermobilization against judicial intervention. Particularly in a multi-party system such as the Canadian one, it is inconceivable that at least one major party would not emphasize a pro-life platform plank if there were a strong backlash against the Court. Instead, abortion is a markedly less salient and divisive issue in Canada than in the U.S. despite the fact that the status quo policy in Canada is much more liberal. If anything, the "legitimation" model explains the Canadian case better than the strong countermobilization model. This, again, suggests that there is nothing essential about "legal" politics that inherently creates more divisiveness and resistance.

Another potential explanation for the relative stability and legislative consensus of abortion in the Canadian case—which is an extension of the variant of countermobilization arguments that emphasize judicial reasoning and judicial prudence—is that the judicial intervention in the Canadian case was more prudent and persuasively defended. Tatalovich, for example, draws a distinction between the "judicial activism" of the United States and the "judicial activity" in Canada,[187] relying upon the underlying that the latter was less likely to provoke resistance. This argument, however, is highly implausible. First, it is far from clear that *Morgentaler* was significantly less "activist" than *Roe*. In terms of the craftsmanship of the decision, *Morgentaler* was a badly split opinion in which no more than two justices signed on to a single opinion, and it received severe doctrinal criticism from both the left[188] and right.[189] Even if one assumes that *Morgentaler* was more persuasively reasoned than *Roe,* there is the greater problem discussed earlier: the public is generally unaware and uninterested in the reasoning used in legal opinions. Few Canadians are able to identify the difference between the substantive due process reasoning that informs the majority opinion in *Roe* and the procedural due process reasoning that inform the plurality opinions in *Morgentaler;* their number is inconsequential to perceptions of the Court. It is true that the Canadian Court left somewhat more legislative leeway for Parliament to maneuver than Congress and the states had before *Casey*, but since Parliament has

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[185] The 2004 platform can be found at http://www.conservative.ca/platform/english/index.htm. Website last accessed June 19, 2004.

[186] Tonda MacCharles et al., Tory Leader Attacks Martin Over Scandal but Harper Put on the Defensive Over Iraq, Abortion, TORONTO STAR, June 15, 2004, at A08.

[187] See TATALOVICH, supra note 132, at ch. 2.

[188] See, e.g., MANDEL, supra note 116, at 409-20.

[189] See, e.g., KNOPFF & MORTON, supra note 183 at ch. 10.

not taken advantage of this leeway this is beside the point. Given that American states have passed a significant amount of legislation restricting abortion since *Roe* while the Canadian Parliament has passed none since *Morgentaler*, it is difficult to argue that the wider latitude afforded by the Canadian courts was decisive. To argue that the difference between the two countries is noticeable in the precise reasoning used by the courts is to rely on assumptions about the importance of legal reasoning to the perception of the courts which are not empirically tenable.

Public Opinion and Abortion in Canada

A possible alternative explanation for the fact that abortion policy has been stable in Canada since *Morgentaler* is that the Canadian public was much more supportive of abortion rights before *Morgentaler* than the American public was before *Roe.* This would still be inconsistent with the strongest version of the countermobilization hypothesis—and especially the "countermajoritarian difficulty" version of this hypothesis—but would help to explain the greater degree of political support for the judiciary's abortion policy intervention in Canada. In fact, however, Canadian public opinion toward abortion in Canada in 1988 was extremely similar to public opinion in the United States in 1988 (which, as previously discussed, was essentially the same as public opinion in the United States prior to *Roe* in 1972.)[190] On the other hand, as in the United States, a majority of the Canadian public was pro-choice, again making claims that the Supreme Court was usurping majority opinion highly questionable. In the Canadian case, because the *status quo ante* was less restrictive than in the Canadian case, is difficult to tell with precision whether the Court was closer to public opinion than Parliament. In 1988, 24% of the Canadian population favored abortion in all circumstances, 60% in some circumstances, and 14% in no circumstances.[191] Which institution was close to public opinion depends precisely on the issue at the heart of *Morgentaler:* was abortion under the current regime available in the appropriate circumstances? That the Court was probably closer to public sentiment than the law it struck down, however, is reflected in the fact that attempts to re-criminalize abortion through new legislation in 1989 were opposed by between 62%-68% of the Canadian public. Since 1989, public opinion on abortion has been relatively stable, with a slight trend in favor of the pro-choice position. According to the Gallup survey, support for abortion in all circumstances has fluctuated between 27%-37%, support for abortion in some circumstances has fluctuated between 51-60%, and support for abortion under no circumstances has fluctuated between 10-14%.[192] As with the American case then, there is little evidence in the data concerning public opinion to support the proposition that the Court ignited any significant backlash. Public opinion on the abortion issue remains stable, and generally skewed toward the pro-choice position.

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[190] See MARGE CHANDLER ET AL, ABORTION POLITICS IN THE U.S. AND CANADA: A STUDY IN PUBLIC OPINION 136 (1994). Attitudes toward Canada were slightly more positive, but the difference was less than the statistical error.

[191] RAYMOND TATALOVICH, THE POLITICS OF ABORTION IN THE UNITED STATES AND CANADA: A COMPARATIVE STUDY 111 (1997).

[192] Public opinion surveys from Opinion Canada, available at http://www.cric.ca/pdf/gallup/gallup_12.12.01_abortion.pdf. Website last visited April 20, 2006.

Summary and Alternative Explanations

The Canadian case, in general, is devastating to the hypothesis that judicial policy-making tends to produce a uniquely large backlash. Because the Court struck down compromise legislation enacted at the national level, during an historical period when feminist politics in general was losing ground against a conservative retrenchment, it would be an ideal candidate for a major backlash against the judiciary. Despite this, the policy status quo—which is arguably the most liberal in the world, with state-funded abortions not restricted by any statute—has remained stable, and so has public opinion. The Mulroney government refused to back abortion legislation with the typical party discipline, and allowed legislation to be killed by the vestigial upper house of the legislature. Since the implosion of the Progressive Conservative Party in 1993, conservative parties in Canada have avoided taking a clear position on the abortion issue and have declined to propose new legislation. The aftermath of *Morgentaler,* in other words, is inconsistent with the expectations of the strong countermobilization hypothesis in every respect. The Canadian case provides particularly strong evidence that the relative divisiveness of the abortion issue in the United States is not a product of judicial policymaking.

If it is not the intervention of legal institutions that explains the relatively more intense and fractious status of the abortion debate in the United States than in Canada, what can? This is an extremely complex question that is beyond the scope of the analysis here, but a few possibilities may be suggested. The most obvious candidate is the relatively greater salience of religion to politics in the United States than in Canada.[193] The mobilization of evangelicals and culturally conservative Catholics in the United States provides a natural support base for the pro-life movement and injects uncompromising moral language into abortion discourse. It is also possible that the Westminster institutional system serves to facilitate consensus (or, depending on one's perspective, to marginalize minority factions), hence favoring the consistent pro-choice majority more than the American system. A final possibility, suggested by the agenda-setting literature,[194] would be that the location of abortion policy in state legislatures in the United States creates more openings for pro-life groups to place the abortion issue on the national agenda, while the location of abortion in national legislatures in Britain and Canada makes it more difficult for pro-life groups to increase the salience of the issue. Whatever the explanation, however, it is clear that the presence of judicial policy-making does not explain this difference.

Conclusion

The empirical evidence suggests that conventional assumptions about the unique characteristics of legal institutions do not provide a good explanation for the form and extent of the countermobilization generated by *Roe v. Wade.* Comparing the aftermath of *Roe* to legal reform at the state level provides scant evidence that judicial intervention creates a greater countermobilization than commensurate policy changes made by legislatures. While claims about the quality of countermobilization are admittedly less easily falsified, they are neither theoretically nor empirically

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[193] On the increasing secularism of Canadian society, see PIERRE BLAIS ET AL., ANATOMY OF A LIBERAL VICTORY: MAKING SENSE OF THE VOTE IN THE 2000 CANADIAN ELECTION 103 (2002).

[194] See FRANK BAUMGARTNER & BRYAN JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS, 1993.

convincing. Non-rights discourses and the discourses surrounding legislative activity in the U.S. were often divisive and uncompromising. There is little evidence for the claims advanced by Glendon and Waldron that an abortion debate confined to legislatures produces a significantly different (let alone "better") discourse than a debate operating in legislatures and courts. While no one of the potential effects one could examine would be definitive evidence that judicial intervention wasn't the cause of the "divisive" abortion debate, the consistency of findings is compelling. In the American case, none of the logical extensions of this hypothesis can be seen in a careful comparison pre-*Roe* politics and post-*Roe* politics. In addition, the stability of abortion policy in Canada after *Morgentaler* provides particularly strong evidence against the strong mobilization hypothesis. While Canada would seem to be a good candidate for a divisive, bitter abortion debate with a strongly aroused pro-life movement, it in fact has a highly liberal abortion policy that is supported by a broad political consensus.

Evidently, there are limitations to this conclusion. An analysis across a wide range of issues may find some in which either legitimation or strong countermobilization arguments may apply. In addition, it should be noted that we might expect a higher level of countermobilization when the court acts in a genuinely countermajoritarian manner; cases such as *Miranda v. Arizona*[195] and *Furman v. Georgia*[196] are potential examples. Again, however, this does not suggest that there is something unique about judicial institutions; rather, it would suggest that legal institutions, like political institutions, mobilize opposition when they produce policy outcomes that are unpopular.

It should also be emphasized that this case study has more explanatory leverage by virtue of being a "tough case." Nobody, after all, claims that there is significant, broad-based countermobilization, for example, to Supreme Court tax law decisions. If unique legal countermobilization does not occur in the case in which it is most often cited as being likely to occur, it is unlikely indeed that this hypothesis will explain many (if any) cases. This finding has at least two important implications for public law scholars. First of all, analyses of controversial Supreme Court decisions such as *Bush v. Gore*[197] and *Lawrence v. Texas*[198] should not start from the premise that the contemporary court's legitimacy is perpetually under attack, and that the public is inherently more likely to react harshly against judicial policy-making (irrespective of the normative legitimacy of particular acts of judicial review.) Second, at a more general level it may be necessary to reconsider some of our assumptions about what (if anything) makes legal institutions distinctive policy-makers. Third, when assessing the effects of judicial review in other polities, it is similarly important not to make essentializing assumptions about the "divisive" or "adversarial" nature of legal politics. Policymaking by legal institutions does not necessarily produce these effects; starting with this premise may cause us to miss important effects that legal politics may in fact possess. Moreover, these essentializing assumptions about courts distort conceptions of politics in a broader sense. The assumption that elected legislatures act in accordance with majoritarian preferences has led some scholars to romanticize the abortion legislation produced by legislatures. Far from being a broadly democratic process, the initial legislative reforms in Canada as well as the first few state-led liberalizations in the United States were in fact heavily elite-driven, and dominated by the influence

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[195] 384 U.S. 436 (1966).

[196] 408 U.S. 238 (1972).

[197] 531 U.S. 98 (2000).

[198] 539 U.S. 558 (2003).

of legal and medical professionals. The appearance that this reform was consensus-driven is an illusion created by the exclusion of both feminist and pro-life constituencies from the process. That both groups would mobilize against legislation created through this process is unsurprising, and not self-evidently undesirable.[199] Whatever one's ultimate conclusion about the policy outcomes produced by the different political processes, however, to begin with the assumption that legislative processes are democratic and judicial processes are not can conceal more than it reveals.

[199] For more on the extent to which arguments about countermobilization reflect a disdain for political conflict, see Robert C. Post and Reva Siegel, *Roe* Rage, *supra* note 28.